89-1691

No. 89-

MAY 1990

IN THE

Supreme Court of the United States

SERENA DUNN, *et al*,
Petitioners,

v.

THE FLORIDA BAR, *et al*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

May a court refuse to award a reasonable attorney's fee under 42 U.S.C. § 1988, after finding that the plaintiff's lawsuit caused the defendants to implement the relief sought in the plaintiff's complaint, because it concludes that the plaintiff would not have prevailed on the merits if the case had been litigated to judgment, even though the trial judge who handled the case had rejected defendants' motions both to dismiss and for summary judgment?

PARTIES

In addition to named petitioner Serena Dunn, petitioners, who were plaintiffs in the district court and appellants in the court of appeals, are Willie A. Wiggs and Marva Pamella Evans, individually, and on behalf of a class of all similarly situated individuals. In addition to the named respondent The Florida Bar, the other respondents-defendants are the Supreme Court of Florida, Chief Justice Raymond Ehrlich, Justice Ben F. Overton, Justice Parker Lee McDonald, Justice Leander J. Shaw, Jr., Justice Rosemary Barkett, Justice Stephen H. Grimes, Justice Gerald Kogan, and Stephen N. Zack, President of The Florida Bar. All of the individual respondents are sued in their official capacities only. Some of the individual respondents listed above are different from those named in the lower court pleadings because the members of the Supreme Court of Florida and the President of The Florida Bar have changed during the course of the litigation.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 889 F.2d 1010 and is reproduced in the appendix at 1a-21a. The opinion of the United States District Court for the Middle District of Florida concerning attorney's fees is reported at 726 F. Supp. 1261 and is reproduced in the appendix at 22a-79a. The other relevant district court opinions, denying respondents' motions to dismiss and for summary judgment, are reproduced at 80a-81a, and 82a-87a, respectively, and are not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 6, 1989. The decision of the court of appeals denying petitioners' petition for rehearing and suggestion for rehearing in banc was entered on February 5, 1990 (88a-89a). This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISION AT ISSUE

42 U.S.C. §1988 provides in pertinent part as follows:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT OF THE CASE

The issue presented in this case is whether a plaintiff who has prevailed in a suit under 42 U.S.C. §1983 on the basis of a settlement, consent order, or other reason short of adjudication on the merits, must nevertheless prove, as a prerequisite to an award of fees under 42 U.S.C. §1988, that she would have been victorious if the case had been litigated to judgment, or whether it is sufficient to show that the suit was not frivolous, unreasonable, or groundless.

1. Proceedings in the District Court

On March 16, 1983, petitioner Serena Dunn filed a class action complaint against respondents The Florida Bar and the Supreme Court of Florida. Ms. Dunn was in need of assistance in filling out forms and legal papers in order to utilize the Florida court system to obtain a divorce. However, she could not afford the services of an attorney, she was ineligible for legal aid, and she was otherwise unable to obtain the services of a lawyer on a *pro bono* or reduced fee basis.

Ms. Dunn, and the class she sought to represent, wanted to employ lay assistants, whose services they could afford, but were prevented from doing so because of rules enforced by respondents prohibiting the unauthorized practice of law (UPL) by non-attorneys. Under the rules in effect until shortly before the case was dismissed, lay assistants could do no more than type the papers that their customers had filled out. But since most of these customers were unable to fill out court papers on their own, Florida's UPL rules effectively barred any use of lay assistants to help prepare even the simplest of divorce papers.

Ms. Dunn contended that the rules precluding lay assistants from aiding her in obtaining a divorce prevented her from exercising her fundamental right to dissolve her marriage, over which the State of Florida had a monopoly, in violation of the equal protection and due process clauses of the Fourteenth Amendment. Because the courts below denied petitioners' claim for attorney's fees solely on the ground that petitioners would not have prevailed on the merits, it is necessary to

explain the theory underlying petitioners' contentions in some additional detail.[1]

The class certified in this case under Fed. R. Civ. P. 23(b)(2) was composed of poor and near-poor Floridians whose access to the courts is severely limited by their inability to hire lawyers. Like most other states, Florida makes divorce and ancillary relief available only through the court system. The complaint alleged that the courthouse doors were effectively shut to the petitioners because they could not prepare the necessary papers on their own, they could not afford attorneys, they were not permitted to utilize the services of the clerk of court to help them, and they were ineligible for legal aid. While petitioners could afford the modest fees charged by legal secretaries or other lay assistants with similar training, respondents' enforcement of the UPL rules prevented petitioners from utilizing the only services they could afford. For instance, Rosemary Furman, whose standard fee was $50 (47a), determined that the UPL rules barred her from even assisting petitioner Dunn, who is illiterate, in completing the divorce forms. Petitioners sought to enjoin enforcement of the rules, which, in the absence of other means of assuring access to the courts, prevented petitioners from exercising their fundamental right to obtain a divorce through the Florida courts.

Petitioners' legal theory was premised on *Boddie v. Connecticut*, 401 U.S. 371 (1971), in which this Court held that it was unconstitutional for a state to charge

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[1] The operative document is the third amended complaint which will, for simplicity, be referred to as the complaint since the differences between it and the original complaint have no bearing on the underlying legal theory on the merits or on the resolution of the fees issue.

indigents a filing fee to obtain a divorce, a right which the Court recognized as fundamental. *Id.* at 376-77, 383. Petitioners analogized their situation to the one presented in *Boddie*, since both groups of plaintiffs were barred from access to the courts because they could not afford to pay, in one case, a filing fee, and in the other, an attorney's fee. Under petitioners' theory, the inability to make full use of lay assistants created, in practical effect, precisely the kind of barrier to access to the state monopoly on divorce that this Court struck down in *Boddie*.

For additional support, petitioners relied on *Johnson v. Avery*, 393 U.S. 483 (1969), where this Court held that it was unconstitutional for a state to discipline jailhouse lawyers who were providing services to inmates, when the state failed to provide any other means of assisting the inmates in exercising their constitutional right of access to the court system. Petitioners argued that, although they were not physically imprisoned, they were economically imprisoned by the state's creation of additional barriers to access through its UPL rules. *See also Bounds v. Smith*, 430 U.S. 817 (1977)(where lawyers or paralegals are unavailable to provide assistance to prisoners, prisoners must have use of a law library to facilitate access to the courts).

Petitioners made it clear throughout the proceedings that they did not contend that the state was required to pay for lawyers or that it bore any other affirmative obligations. Nor did they argue that there was an absolute right to the services of lay assistants, for indigents or others, in all areas for which legal assistance might be needed. Petitioners' sole legal contention was that the state could not create barriers to the exercise of

fundamental rights, such as divorce, through its rules on unauthorized practice, and then disclaim any responsibility for erecting such barriers. Accordingly, petitioners sought only a negative injunction preventing the enforcement of the rules as they applied to state-created monopolies involving fundamental rights, the same type of limitation that this Court imposed in *Boddie*.

Before answering, respondents moved to dismiss petitioners' complaint for lack of subject matter jurisdiction and for failure to state a claim, motions which the district court denied in a brief opinion (80a-81a). Following extensive discovery and class certification, and after the pre-trial order had been filed, respondents moved for summary judgment. In November 1986, after briefing and oral argument, those motions were denied (82a-87a). In February 1987, the court scheduled the case for a five day non-jury trial to begin in October 1987.

Meanwhile, after denial of respondents' motions for summary judgment, and approximately three and one-half years after the commencement of this litigation, a committee of The Florida Bar first began to consider amendments to its UPL rules substantially implementing the relief requested by the petitioners. After the trial date had been set, The Florida Bar approved the proposal, it was published for public comment, and petitioners' counsel submitted comments on behalf of his clients to the Florida Supreme Court, which alone had the authority to implement the change. In a *per curiam* order issued on July 9, 1987, the Florida Supreme Court approved the revised rule, mainly as proposed by The Florida Bar, but also incorporating all of petitioners' suggested modifications. *The Florida Bar Re Amendments to Rules*

Regulating the Florida Bar (Chapter 10), 510 So.2d 596 (Fla. 1987). As a result, a stipulation of dismissal was filed which concluded the case with prejudice on all issues with the exception of attorney's fees (22a-23a).

The district court then entertained petitioners' application for attorney's fees. The Honorable Howell W. Melton had presided over the proceedings on the merits, but his involvement in a lengthy criminal trial caused the attorney's fees issue to be transferred to the Honorable William K. Thomas, a visiting Senior District Judge from the Northern District of Ohio, who had no prior involvement in the case.

After a hearing and briefing, Judge Thomas issued an opinion denying petitioners' application for attorney's fees. The court held that petitioners were not prevailing parties within the meaning of 42 U.S.C. § 1988 on the ground that they had failed to present a "colorable" constitutional claim on the merits (54a), even though Judge Melton had previously denied respondents' motions to dismiss and for summary judgment. The court did so by requiring that petitioners' claim be more than just colorable. Instead, the court engaged in a lengthy analysis of the merits of the constitutional argument, and then held that petitioners would not have prevailed if the case had been litigated to judgment, rather than having been concluded pursuant to a stipulated dismissal.[2]

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[2] Both the district court and the court of appeals held that petitioners' lawsuit was the catalyst which prompted the change in the UPL rules and, thus, petitioners would have been entitled to fees under section 1988 had they presented a colorable constitutional claim on the merits (63a, 11a). The district court also held that petitioners were only partially successfully in obtaining the relief sought in the lawsuit (79a), but the court of appeals

continued

2. Opinion of the Court of Appeals

The court of appeals affirmed. After reviewing the facts and procedural history of the case, the court considered whether petitioners had prevailed under section 1988. The court held that, indeed, petitioners were prevailing parties because their suit "played a significant role in accomplishing the relief they desired (11a)." The court found "tenuous at best" respondents' arguments to the contrary, giving emphasis to the fact that The Florida Bar first considered amending the UPL rules just after the district court had denied respondents' motions for summary judgment (10a).

The court of appeals then turned to whether petitioners had presented a "colorable constitutional claim (12a)." Despite this initial delineation of its task, the court began its discussion with a quote from *Doe v. Busbee*, 684 F.2d 1375, 1381 (11th Cir. 1982), indicating that the prevailing party must show that it has "vindicate[d] *a civil right*" in order to obtain fees under section 1988 (12a) (emphasis supplied by the court of appeals). *Doe*, however, was not a case involving settlement or a stipulated dismissal, but a case in which

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disagreed and held that they had achieved complete success (11a). Recognizing that its judgment might be reversed (54a), the district court ruled on the reasonableness of the rates requested and hours expended by counsel, making small reductions in the hourly rates requested by petitioners' attorneys (67a), disallowing time spent by petitioners' attorney submitting comments to the Florida Supreme Court (68a), and rejecting petitioners' claim for a multiplier (70a), decisions which petitioners did not challenge in the court of appeals.

the district court had vacated its previous award of injunctive and declaratory relief in light of intervening decisions of this Court which made it clear that the plaintiffs' claims were absolutely foreclosed, *i.e.*, no longer even "colorable."

Continuing its analysis, the court of appeals stated that, in order to obtain a fee under section 1988 where defendant's conduct moots the case, the prevailing party "must demonstrate ... that the defendant's conduct was *required by law* (12a)" (emphasis in original), *citing Williams v. Leatherbury*, 672 F.2d 549, 551 (5th Cir. 1982). The court emphasized that "[a]ppellants have achieved their goal, yet despite this result, they do not merit relief [*i.e.*, attorney's fees] if constitutional factors do not *require* that end (13a)" (emphasis in original).

The court next proceeded to examine in detail "the nature of the appellants' claim (14a)." It reviewed the merits of petitioners' constitutional argument, rendering a lengthy advisory opinion in which it concluded that *Boddie* should be limited strictly to its facts in light of *United States v. Kras*, 409 U.S. 434 (1973)(waiver of filing fees to indigent in no-asset bankruptcy not constitutionally required), and that, because *Johnson v. Avery* "concerned inmates in a state prison (15a)," the access to jailhouse lawyers accorded in that case could not be analogized to non-incarcerated persons who have the literal physical freedom to seek help from family and friends (17a).

After canvassing additional circuit precedent, Judge Hill concluded that while *Boddie*, *Johnson*, and *Bounds v. Smith*, *supra*, allow easier court access for some categories of people, "they do *not* burden the state with a constitutional obligation to provide lay assistance to a

narrowly proscribed class of indigents (18a)" (emphasis in original)(footnote omitted). Finally, the court concluded that, although respondents had "relaxed their traditional prohibition against ... the unauthorized practice of law," they did not do "so under any *constitutional* compulsion (20a)" (emphasis in original), and hence petitioners were not entitled to fees.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW IS IN CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS AND OF THIS COURT, AND PRESENTS AN IMPORTANT ISSUE REGARDING THE AWARD OF ATTORNEY'S FEES.

The court of appeals in practical effect required petitioners to show that they would have prevailed had the case been litigated to judgment, rather than concluded by stipulated dismissal, as was actually the case. This holding requires the Court's attention because it is in conflict with decisions of other courts of appeals and of this Court, undermines important policies of the Civil Rights Attorney's Fees Awards Act, greatly impairs the prospects for settlement in civil rights actions, and virtually mandates the issuance of advisory opinions on sensitive constitutional issues.

1. While the court of appeals engaged in a lengthy analysis of the merits of petitioners' previously settled claim, finding it not "required by law (12a)," nine circuit courts of appeals require only that the prevailing

plaintiff's claim be non-frivolous or meet some other standard of legal plausibility as a prerequisite to an award of fees under section 1988. *See Sablan v. Department of Finance of N. Mariana Islands*, 856 F.2d 1317, 1325 (9th Cir. 1988)("frivolous, unreasonable, or groundless"); *Illinois Welfare Rights Organization v. Miller*, 723 F.2d 564, 566 (7th Cir. 1983)(same); *Miller v. Staats*, 706 F.2d 336, 341 & n.31 (D.C. Cir. 1983)("not wholly frivolous"); *Johnston v. Jago*, 691 F.2d 283, 287 (6th Cir. 1982)("patently frivolous"); *Williams v. Leatherbury*, 672 F.2d 549, 551 (5th Cir. 1984)("frivolous or groundless"); *Staten v. Housing Authority of City of Pittsburgh*, 638 F.2d 599, 605 (3d Cir. 1980)("not frivolous"); *United Handicapped Federation v. Andre*, 622 F.2d 342, 347 (2d Cir. 1980)("frivolous, unreasonable, or groundless"); *Oldham v. Ehrlich*, 617 F.2d 163, 168 (8th Cir. 1980)("non-frivolous constitutional claim"); *Nadeau v. Helgemoe*, 581 F.2d 275, 281 (1st Cir. 1978)("frivolous, unreasonable, or groundless," *citing Christiansburg Garment Co. v. E.E.O.C.*, 434 U.S. 412, 422 (1978)).[3]

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[3] Petitioners recognize that the court of appeals did quote a portion of *Garcia v. Guerra*, 744 F.2d 1159, 1162-63 (5th Cir. 1984), *cert. denied*, 471 U.S. 1065 (1985), which sets out the "frivolous or groundless" language (12a). But this passing acknowledgement of the proper standard cannot overcome the fact that the court repeatedly described its task as deciding whether respondents' conduct was "required by law (12a)," or was taken under any "constitutional directive (21a)" or "constitutional compulsion (20a)." Moreover, the court's detailed advisory opinion, issued despite the denials of respondents' motions to dismiss and for summary judgment, makes clear that petitioners were denied fees on the ground that they would not have prevailed on the merits had the case been fully litigated.

continued

On the other hand, the Tenth Circuit, like the Eleventh Circuit here, asks whether the "response to the lawsuit was required by the Constitution or federal law, i.e. the defendant's actions must be legally required." *Supre v. Ricketts*, 792 F.2d 958, 962-63 (10th Cir. 1986). As a result, that court has rendered lengthy advisory opinions on significant issues of constitutional law in the context of deciding fee petitions. *See, e.g., Foremaster v. City of St. George*, 882 F.2d 1485, 1488-89 (10th Cir. 1989)(municipal utility subsidy to light Mormon temple violates Establishment Clause); *Luethje v. Peavine School District of Adair County*, 872 F.2d 352, 354-56 (10th Cir. 1989)(detailed First Amendment inquiry); *Supre, supra* (Eighth Amendment analysis concerning provision of medical treatment to prisoners). Therefore, the split in the circuits involves two courts of appeals which are in essence requiring that plaintiffs relitigate and "win" the claims they have settled in order to obtain fees. This Court should grant review in order to resolve this division among the courts of appeals.[4]

It is also worth noting that the court of appeals obscured the formulation given in the leading case of *Nadeau v. Helgemoe, supra*, by indicating that the defendant's conduct must be "required by law (13a n.3)," but failing to refer to the *Nadeau* court's explanation of that standard under which the court asks whether the claim is not "frivolous, unreasonable, or groundless." *Nadeau*, 581 F.2d at 281.

[4] The Fourth Circuit has applied an even more lenient test than the one espoused by the majority of the circuits. Under this test, there is no apparent legal threshold, and the fee applicant must only prove a factual nexus between the defendant's conduct which benefitted the plaintiff, and the lawsuit. *Bonnes v. Long*, 599 F.2d 1316, 1319 (4th Cir. 1979), *remanded*, 651 F.2d 214 (4th Cir. 1981), *cert. denied*, 455 U.S. 961 (1982). Review of the decision below will necessarily resolve that conflict, as well as the one squarely presented by this case. *See Long v. Bonnes*, 455 U.S. 961, 966 n.3

continued

2. In addition to this lack of national uniformity, the decision below warrants this Court's attention because it conflicts with the purposes of section 1988 and prior decisions of this Court. Section 1988 was intended to extend to plaintiffs who settle or who otherwise do not "formally obtain[] judicial relief." S. Rep. No. 94-1101, 94th Cong., 2d Sess. 5, *reprinted in* 1976 U.S. Code Cong. & Admin. News 5908, 5912; *see Maher v. Gagne*, 448 U.S. 122 (1980); *Hewitt v. Helms*, 482 U.S. 755, 761 (1987). Obviously, Congress' intention is frustrated if plaintiffs must first "prevail" in a non-judicial resolution of the case and then must also show that they would have won on the merits. Indeed, taking the court of appeal's approach to its logical extreme, even where the plaintiff has won in the district court and then settles while an appeal on the merits is pending, the defendant will still have an incentive to contest fees on the theory that the appellate court might disagree with the lower court on the merits.

In *Maher v. Gagne*, *supra*, this Court affirmed an award of fees under section 1988 to plaintiffs who had prevailed pursuant to a consent decree, despite defendants' arguments that the award was barred by the Eleventh Amendment and that fees could not be recovered where no formal judicial relief had been entered. The complaint in *Maher* had alleged Fourteenth Amendment claims, on which this Court did not pass, but

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(1982) (Rehnquist, J., joined by O'Connor, J., dissenting from denial of certiorari)(test should be whether lawsuit is "frivolous, unreasonable, or groundless," *quoting Nadeau*, 581 F.2d at 281)

simply observed that they were "sufficiently substantial to support federal jurisdiction under *Hagans v. Lavine*, [415 U.S. 528 (1974)]." 448 U.S. at 131. The Court deemed important the fact that the constitutional issues "remained in the case until the entire dispute was settled... ." *Id.*; *accord id.* at 134 (Powell, J., concurring in the judgment)(because claims were "substantial" under *Hagans*, "we have no occasion to look behind the settlement to evaluate further the constitutional cause of action").

Because here the court of appeals went "behind the settlement to evaluate further the constitutional cause of action," its opinion conflicts with the teachings, if not the actual holding, of *Maher*, and with the opinion of Justices Rehnquist and O'Connor, dissenting from the denial of certiorari in *Long v. Bonnes*, *supra*.

3. The decision of the court of appeals will undermine the longstanding, and increasingly important, public policy favoring settlement and other forms of extra-judicial dispute resolution. *See, e.g., Marek v. Chesny*, 473 U.S. 1, 5, 10-11 (1985); Fed. R. Civ. P. 68; Fed. R. Civ. P. 16(a)(5), (c)(7). Not only will the court of appeals' decision reduce the likelihood of settlement on the merits, but it will give defendants another reason to deny fees, or to refuse to settle them, based on the chance that they can win "on the merits" as respondents did here. At the very least, discovery would be unduly protracted, even with respect to claims on the verge of settlement, not because the parties desired information relevant to the merits, but because the plaintiff believed such information was essential to prove entitlement to fees.

A system in which a plaintiff's successful settlement

of a civil rights action is followed by a trial of the underlying claim to obtain a fee would render meaningless, in the most ironic context, Justice Powell's admonition that a "request for attorney's fees should not result in a second major litigation." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983); *see also Long v. Bonnes*, *supra*, 455 U.S. at 966 n.3 (Rehnquist, J., joined by O'Connor, J., dissenting from denial of certiorari)(test for determining right to fees "does not require a finding that the petitioner would have prevailed on the merits, nor does it require the trial court to hold the very trial which the settlement was intended to avoid"); *Garcia v. Guerra*, 744 F.2d 1159, 1162 (5th Cir. 1984)(requiring a showing that petitioners would have won on the merits "would totally obviate the time and financial benefits that flow from a resolution of a lawsuit prior to a full blown hearing on the merits"), *cert. denied*, 471 U.S. 1065 (1985). Therefore, allowing the ruling below to stand would both impair policies favoring settlement and increase the complexity of fee litigation.

4. What is most distressing about the decision below is its potential for damage to the bedrock constitutional principle enshrined in Article III, Section 2, that federal courts sit to decide "cases" or "controversies." While, of course, petitioners' right to fees was, and is, a live controversy, the merits of the instant case were moot after entry of the stipulated dismissal. Nevertheless, the court of appeals issued an advisory opinion, rejecting petitioners' constitutional claim.

If the case had been litigated on the merits, petitioners would have presented detailed argument on each of the points raised in the court of appeals' opinion, not the least of which would have been that the

petitioners did not seek to impose "a constitutional obligation to provide lay assistance" to the class, as the court erroneously suggested (18a). To the contrary, at no time did petitioners argue that the State of Florida was obligated to provide them free assistance of any kind in divorce or other matters, making inapposite the panel's discussion of whether the Constitution requires the provision of counsel in certain civil matters (18a & n.6). All that they sought was a negative injunction, setting aside the UPL rule, so that they could utilize lay assistants to help them file for divorce.

For these purposes, however, the point is not whether the court of appeals' advisory opinion was wrong, but that it gave one at all, instead of simply inquiring into whether petitioners' claim was frivolous. But now that it has ruled, future litigants must assume that a claim based on *Boddie* is foreclosed by Eleventh Circuit "precedent." Conversely, if petitioners had been awarded fees under the standard employed by the court of appeals, that decision could be viewed as binding precedent on the merits, affecting UPL rules in Florida and the other states comprising the Eleventh Circuit. Especially in the context of section 1988, where many of the underlying claims are grounded in the Constitution, attorney's fees disputes should be decided in a way that avoids, rather than mandates, advisory opinions. *Cf. Califano v. Yamaski*, 442 U.S. 682, 692-93 (1979).

The establishment of constitutional precedent based on advisory opinions is not idle speculation, but a necessary by-product of a rule which encourages the issuance of such opinions. Recently, the Tenth Circuit, in considering the First Amendment claim of a public school employee, treated its prior attorney's fees ruling in

Luethje, *supra*, as binding precedent on the merits and distinguished it at some length, without even mentioning that the case arose wholly in the context of resolving a fee dispute in an otherwise moot case. *See Johnsen v. Independent School District No. 3 of Tulsa County, Oklahoma*, 891 F.2d 1485, 1494 n.6 (10th Cir. 1989).

In short, requiring that a plaintiff effectively prove her case after it is moot carries with it a major problem attendant to any expansion of Article III jurisdiction: the court is being asked to decide the issue in the abstract, without the normal incentives for full argument and record development, *i.e.* those attributes of adjudication which give life and meaning to the term "case or controversy." *See United States v. Freuhauf*, 305 U.S. 146, 157 (1961); *Garcia*, *supra*, 744 F.2d at 1166 (Randall, J., concurring)(if claim is not "frivolous or groundless" court should award fee, "intimating no opinion on the merits"). *Cf. Hewitt*, *supra*, 482 U.S. at 762. For this reason, as well as those relating to the fair and efficient operation of section 1988, review of the ruling of the Eleventh Circuit should be granted.

CONCLUSION

For the reasons given above, the petition for writ of certiorari should be granted.

Respectfully submitted,

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May 1, 1990

APPENDIX

Serena DUNN, individually and Willie A. Wiggs, and Marva Pamela Evans, individually and on behalf of similarly situated individuals, Plaintiffs-Appellants, Cross-Appellees,

v.

THE FLORIDA BAR, the Supreme Court of Florida, Gerald F. Richman, President, The Florida Bar, et al., Defendants-Appellees, Cross-Appellants.

No. 88-3865.

United States Court of Appeals,
Eleventh Circuit

December 6, 1989

Before KRAVITCH, Circuit Judge, HILL,* Senior Circuit Judge, and FREEMAN,** District Judge.

HILL, Senior Circuit Judge:

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* *See* Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit

** Honorable Richard C. Freeman, U.S. District Judge for the Northern District of Georgia, sitting by designation.

The appellants, who sought an amendment of one of the rules of The Florida Bar, have voluntarily dismissed their lawsuit, but continue to seek attorneys' fees pursuant to 42 U.S.C. § 1988. The appellees deny that appellants are prevailing parties and deny that this case involves any rights secured by the United States Constitution. Thus, the appellees contend that the appellants did not assert a colorable constitutional claim that would entitle them to attorneys' fees under 42 U.S.C. § 1988. The district court has entered a memorandum and order denying the appellants' application for fees on the grounds that they lacked a colorable claim. The court also made an alternative ruling that, had "the plaintiffs ... established their threshold constitutional entitlement under section 1983, to seek attorneys' fees under section 1988," then "... the court would award as reasonable attorneys' fees one-half of the net fees previously calculated."

We affirm the district court's initial ruling that the appellants are not entitled to any fees at all.

I. FACTS

This case began life in another form. Its origins may be found in an entirely different matter, *The Florida Bar v. Furman*, 376 So.2d 378 (Fla.1979), *appeal dismissed*, 444 U.S. 1061, 100 S.Ct. 1001, 62 L.Ed.2d 744 (1980). In that case, the Florida Bar brought a civil action against Ms. Rosemary Furman, a legal secretary who assisted individuals, seeking divorces, who appeared *pro se* in the Florida courts. Specifically, Ms. Furman obtained information from the individuals, typed up the necessary papers, instructed them how to file and proceed with their

cases, all for a fee of $50.00. The Bar argued, and the Florida Supreme Court agreed, that her activities constituted the unauthorized practice of law.

During the course of Ms. Furman's defense, her attorney, Mr. Alan B. Morrison, determined to test a legal theory that, under cases such as *Boddie v. Connecticut*, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971), and *Johnson v. Avery*, 393 U.S. 483, 89 S.Ct. 747, 21 L.Ed.2d 718 (1969), the state may not constitutionally deny access to the legal system to those unable to pay for matters such as divorce. Thus, Ms. Furman told the original plaintiff in this action, Serena Dunn, that she could not a sist her directly in obtaining a divorce; however, Ms. Dunn might become a plaintiff in a test case challenging the constitutionality of the Florida Bar rules.

II. PROCEDURAL HISTORY

On March 16, 1983, Ms. Dunn who is illiterate, individually and on behalf of a class of similarly situated individuals, filed her complaint for declaratory and injunctive relief against The Florida Bar and The Supreme Court of Florida. In part, she stated:

> Plaintiff class members are unable to afford the services of attorneys to assist them in obtaining relief which only the state can provide and are also unable, by reason of their illiteracy, blindness, their inability to read and write English, or other handicap to handle their matters *pro se* or with the limited assistance currently allowed to be provided by lay persons under Florida law.

On January 5, 1984, the district court denied an earlier motion to dismiss of defendant Florida Bar. On November 15, 1984, the court entered an order granting class certification in this matter; the Court determined that Willie A Wiggs and Marva Pamela Evans were adequate representatives of the plaintiff class. As ordered, Ms. Dunn, Mr. Wiggs and Ms. Evans filed a third amended complaint, which alleged:

> [T]he Supreme Court has determined that lay assistants, such as legal secretaries, may do no more than type verbatim court pleadings that are given to them by their customers. They are forbidden from using intake forms to obtain from their customers the information called for in the pleadings, and they may not discuss the papers given them by their customers, even when the papers are incomplete or contain contradictory information. Failure to adhere strictly to these instructions subjects such lay assistants to injunctive actions, such as civil and criminal contempt proceedings, brought by the defendants.

Unlike Ms. Dunn, Mr. Wiggs and Ms. Evans are literate. They allege that they bring their action on behalf of a class of similarly situated individuals, consisting of all present and future residents of the Fourth Judicial Circuit of Florida:

> (a) who either presently desire, or in the future may desire, to exercise their fundamental right to obtain a dissolution of marriage;

(b) who are unable to exercise their right to do so without the assistance of another person because they lack the skills, knowledge, familiarity with the court system, self-confidence, and other abilities required to appear *pro se*;

(c) who are not eligible to utilize the simplified dissolution of marriage procedures in Rule 1.611(c) of the Florida Rules of Civil Procedure which entitle them to the assistance of the Clerk of the Court in obtaining a dissolution of marriage;

(d) who are unable to obtain the services of a lawyer because they cannot afford to pay the charges of a lawyer and because no lawyers are available to serve them on a *pro bono* or reduced fee basis; and

(e) who are able to afford the services of persons who, although not members of the Bar, are able to provide them the assistance they need to obtain a dissolution of their marriage and for which they charge members of the plaintiff class an amount which the class members can afford; but who are unable to utilize the services of such lay assistants because of the instructions against lay assistants providing such services which are enforced by defendants.

The Florida Bar and the Florida Supreme Court filed separate motions for summary judgment on September 27, 1985 and October 2, 1985; on November 10, 1986 the district court denied the motion of each defendant. The court set a trial date of October 13, 1987, but the appellants' voluntary dismissal of the case on August 27,

1987 mooted the trial. The district court, therefore, never resolved the constitutional question that the appellants posed.

On March 20, 1987, the Florida Bar Board of Governors approved a proposed amendment to Supreme Court Rule 10-1-1(b), Rules Governing the Investigation and Prosecution of the Unlicensed Practice of Law. The amendment read as follows:

> UPL. The unlicensed practice of law, as prohibited by statute, court rule, and case law of the State of Florida. For purposes of this chapter, it shall not constitute the unlicensed practice of law for nonlawyers to engage in limited oral communication to assist individuals in the completion of legal forms approved by the Supreme Court of Florida. Oral communication by nonlawyers is restricted to those communications essential to elicit factual information necessary for the completion of the form(s) and inform the individual how to file such form(s).

On June 9, 1987, the appellants' counsel submitted comments to the Supreme Court "on behalf of Serena Dunn and the other members of the certified plaintiff class in the case of *Serena Dunn, et al v. The Florida Bar, et al....*" Mr. Morrison noted that we are troubled by some of the instructions contained in [the amendment], and we urge the court to modify them." He went on to request two small changes, "... that the word 'essential' ... be changed to 'reasonably necessary' [to]... eliminate the *in terrorem* effect ..." and "that the phrase 'necessary for the completion of' . . . be changed to 'to complete.'"

Mr. Morrison also asked the court to make clear "... that non-lawyers may tell the individuals, for example, how many copies must be filed, what the filing fees are, what is the proper method of payment, how long the typical period is before a hearing will be scheduled, and other matters of a routine administrative nature...."

On July 9, 1987, the Supreme Court of Florida issued a *per curiam* under the caption "The Florida Bar Re Amendment to Rules Regulating the Florida Bar (Chapter 10)." The *per curiam* noted that "[c]omments to the proposed amendment have been filed by an attorney representing a class of plaintiffs who wish to dissolve their marriages but who cannot afford a lawyer, who are ineligible for legal aid, who cannot currently be assisted by clerks of court, and who are unable to prepare the required papers by themselves." *Florida Bar*, 510 So.2d 596, 597 (Fla.1987). The court held:

> After considering this matter, we adopt the bar's proposal, as amended by the comments we have received. We also hold that nonlawyers can give information regarding routine administrative matters.

510 So.2d at 597.

On July 27, 1987, Mr. Morrison wrote C. Harris Dittmar, Esq., counsel for The Florida Bar, and Mr. Eric J. Taylor, Esq., Assistant Attorney General, Department of Legal Affairs, counsel for the Supreme Court. Mr. Morrison informed them that, "[b]ased upon this change in the rules, which was initiated by the Bar and approved by the Supreme Court of Florida, plaintiffs have now obtained substantially all of the relief which they had sought and, accordingly, there is no reason for them to

continue the case." He proposed a stipulation dismissing the case with prejudice, except for the question of attorneys' fees.

The issue of attorneys' fees concerns us now.

III. THE ISSUES ON APPEAL

The appellants have raised two issues on appeal. They first contend that they were the prevailing parties in this matter for the purposes of section 1988, despite the settlement, since their lawsuit became the catalyst for the change in the rules of the Florida Bar. They also assert that their claim raised colorable constitutional issues for the purposes of section 1988.

A. Prevailing Parties

[1] Appellees in this matter vigorously contend that appellants are not prevailing parties within the meaning of section 1988. It is true that the district court did not adjudicate the merits of the appellants' claim; the appellants voluntarily dismissed their lawsuit, explaining that the subsequent change in the Florida Bar Rules had satisfied their claim.

We first note, as many circuits have held, that "a party may prevail and be entitled to attorneys' fees when remedial action by the defendant effectively moots the controversy subsequent to filing of the lawsuit." *Iranian Students Ass 'n v. Sawyer*, 639 F.2d 1160, 1163 (5th Cir.1981). The Supreme Court, in turn, has held that "[t]he fact that respondent prevailed through a settlement rather than through litigation does not weaken her claim to fees." *Maher v. Gagne*, 448 U.S. 122, 129,

100 S.Ct. 2570, 2575, 65 L.Ed.2d 653 (1980). *See also Doe v. Marshall*, 622 F.2d 118, 120 (5th Cir.1980); *Robinson v. Kimbrough*, 652 F.2d 458, 465 (5th Cir.1980); *Criterion Club v. Board of Comm'rs*, 594 F.2d 118, 120 (5th Cir.1979).[1] As the Fifth Circuit has noted:

> The Act's legislative history evinces a clear Congressional intent to award attorney's fees even when no formal judicial relief is obtained and no final judicial determination is made on any constitutional claim. The Senate Report explains that 'parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief.' S.Rep. No. 94-1011 at 5, [94th Cong.2d Sess., *reprinted in* [1976] U.S.Code Cong. & Admin.News at 5912].

Robinson v. Kimbrough, 652 F.2d at 465. In the instant case, therefore, the district court's inability to adjudicate the merits of appellants' constitutional claim would not bar an award for fees.

Appellees, however, do not assert that merely the controversy's mootness precludes the appellants from prevailing. They also contend that this court should not credit the appellants with sole, or even primary, responsibility for the change in rules; they contend instead that "... the changes in the unlicensed practice of law rules adopted by the Florida Supreme Court were the

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[1] The Eleventh Circuit in the en banc decision *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981), adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981.

product of a process that predated this lawsuit by at least four years, and which has continued independently of, and notwithstanding, the plaintiff's action." They likewise contend that the amendment offered such a "minor relaxing of the strict prohibition" against unauthorized practice that "the amendment to the Rule offered no relief for this type of person."

We find both these contentions tenuous at best. As appellants point out, the Florida Bar's Access Committee first considered amending the UPL rules in November, 1986, the *same* month that the district court denied the appellants' [sic] motion for summary judgment. Furthermore, in March 1987, the month after the district court set the case down for trial, the Committee recommended the changes to the Bar's Board of Governors, which then recommended them to the Florida Supreme Court. We find this sequence enlightening. We also find the language of the First Circuit, faced with a similar case, helpful:

> We ... note that we consider the chronological sequence of events to be an important, although clearly not definitive factor, in determining whether or not defendant can be reasonably inferred to have guided his actions in response to plaintiff's lawsuit. This is particularly true where the evidence relevant to the causes of defendant's behavior is under defendant's control and not easily accessible to the plaintiff.

Nadeau v. Helgemoe, 881 F.2d 275, 281 (1st Cir.1978). In the instant case, moreover, the Florida Supreme Court expressly considered, and implemented, the comments of

appellants' counsel when it altered the proposed rule. *Florida Bar*, 510 So.2d at 597. We are satisfied, therefore, that appellants' role in the Rule amendment was significant; we see no reason to minimize their responsibility, or their achievement, now.

We are also satisfied that appellants achieved approximately all of the relief they sought. Certainly, appellants' counsel referred to "this change in the rules" in his decision to dismiss the suit; he also explained that "plaintiffs have now obtained substantially all of the relief which they had sought and, accordingly, there is no reason for them to continue the case." Appellants' Third Amended Complaint, moreover, prays only that lay assistants be allowed to "[aid] plaintiffs ... in obtaining dissolution of their marriages," plaintiff's Memorandum in Opposition to Motion of the Florida Bar to Dismiss asks that lay assistants be permitted to obtain "information necessary to complete divorce pleadings from ... clients orally." The new rule permits precisely this relief.[2] Appellees argue that even under the new Rule, lay assistants may not *inter alia*, "[carry] on unrestricted oral communication with the customer." We agree that appellants did not achieve a complete repeal of the prohibition against oral communication; the revised rule, however, certainly incorporates the spirit of the changes that they sought. We hold, therefore, that appellants played a significant role in accomplishing the relief that they desired. The record, moreover, amply supports the

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[2] As noted previously, the new rule states, "...it shall not constitute the unlicensed practice of law for nonlawyers to engage in limited oral communications to assist individuals in the completion of legal forms approved by the Supreme Court of Florida."

district court's finding of "a clear causal connection between the prosecution of the *Dunn* case and the Florida Bar's proposed revised ... Rule."

B. Colorable Constitutional Claim

[2] Appellants prevailed. We must next examine whether, "consistent with the policy underlying § 1988, [they] in some way vindicate[d] *a civil right* at issue in the litigation against the violation of that civil right ..." *Doe v. Busbee*, 684 F.2d 1375, 1381 (11th Cir.1982) (emphasis supplied). As the Fifth Circuit has noted in *Williams v. Leatherbury*, 672 F.2d 549, 551 (5th Cir.1982), even if a defendant unilaterally undertakes action that moots the controversy, a plaintiff may nevertheless recover attorneys' fees if he can demonstrate (1) a causal connection between the filing of the suit and the defendant's action; and (2) that the defendant's conduct was *required by law*. In a similar context, the Fifth Circuit stated:

> The second prong of the *Leatherbury* test, consequently, does not require appellants to show that they would have won on the merits. Rather, as the *Leatherbury* case said, appellants need only show that the action taken by the appellees was "not a wholly gratuitous response to an action that in itself was frivolous or groundless." (citation omitted). A claim is not frivolous if it is arguably supported by case or statutory law.

Garcia v. Guerra, 744 F.2d 1159, 1162-63 (5th Cir.1984).[3]

The scenario in the instant case is a complicated one. Appellees complied with appellants' requests; they amended the Rules of the Florida Bar to ensure that lay assistants could provide limited aid to those in need of a divorce, who could not proceed *pro se*, and who could not afford the services of an attorney. Appellants have achieved their goal, yet despite this result, they do not merit relief if constitutional factors do not *require* that end. Once more we borrow language from the Fifth Circuit:

> ... [A] plaintiff who brings an action that has no colorable, or even reasonable, likelihood of success on the merits is not entitled to recover attorney's fees if the defendant simply complies with the plaintiff's demands and moots the case for reasons that have nothing to do with the potential merit of the suit.

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[3] For other restatements of the "colorable claim" test, *see Robinson v. Kimbrough*, 652 F.2d 458, 466 (5th Cir. 1981)("...plaintiffs may recover attorneys' fees if their lawsuit is a substantial factor or a significant catalyst in motivating the defendants to end their unconstitutional behavior."); *Bly v. McLeod*, 605 F.2d 134, 139 (4th Cir.1979)("...in deciding whether one is a prevailing party under the statute, the court should consider the precise factual/legal condition the fee claimant sought to change, and with that done and as a benchmark, the court should then consider whether the plaintiff fee claimant's efforts contributed in a significant way to the change."); *Nadeau v. Helgemoe*, 581 F.2d 275, 281 (1st Cir.1978)("If is has been judicially determined that the defendants' conduct, however beneficial it may be to plaintiff's interests, is not required by law, then defendants must be held to have acted gratuitously and plaintiffs have not prevailed in a legal sense.") *See also* "Attorney's Fees in Moot Cases," 49 U.Chi.L.Rev. 819 (1982).

> Whether activated by economic, political, or purely personal concerns, a defendant may choose voluntarily to make the change sought in the suit rather than undergo protracted and expensive litigation.

Hennigan v. Ouachita Parish School Bd., 749 F.2d 1148, 1153 (5th Cir.1985).

At this point, we must squarely examine the nature of the appellants' claim. We approach this subject with caution, for we do not wish to suggest that the novelty of the appellants' claim compels its defeat:

> Actions based on novel legal theories generally require greater attorney effort than actions based upon familiar legal theories. This effort, in turn, may pay later dividends in ensuring that previously unprotected classes receive the benefit of rights that the Constitution or statutes guarantee.

Teitelbaum v. Sorenson, 648 F.2d 1248, 1250 (9th Cir.1981).[4] The practice of constitutional law has never been a glib or facile exercise; no court, and no counsel, can state with ease or accuracy the limitations on rights enumerated or implied by the Constitution:

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[4] Congress, moreover, apparently did not intend the novelty of a plaintiff's claim to bar his relief. The Senate Report discussing the Attorney's Fees Act cites with approval *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir.1974). *See* S.Rep. No. 94–1101, 94th Cong.2d Sess. 6, *reprinted in* [1976] U.S.Code Cong. & Ad.News 5908, 5913. *Johnson* states that a claim's novelty is a factor *favoring* a fee award. *Johnson*, 488 F.2d at 1250.

> A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would, probably, never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves.

McCulloch v. Maryland, 17 (4 Wheat.) U.S. 316, 407, 4 L.Ed. 579 (Wheaton) (1819). Constitutional law, of necessity, evolves; claims once novel may become established. Our task, therefore, is a difficult one; we must examine prior case and statutory law, not only to ascertain their holdings and text, but to examine their ramifications, and to determine to our own satisfaction that the Constitution could not, under even the most expansive of interpretations, lend color to appellants' claim.

Appellants based their constitutional claim upon two Supreme Court decisions, *Boddie v. Connecticut*, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971) and *Johnson v. Avery*, 393 U.S. 483, 89 S.Ct. 747, 21 L.Ed.2d 718 (1969), and referred to a third, *Bounds v. Smith* 430 U.S. 817, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977). *Boddie* held that due process prohibits a state from denying, solely on account of inability to pay court fees and costs, access to its courts to indigents who in good faith seek a divorce. *Johnson* concerned inmates in a state prison; the

Court held that, in the absence of some provision by the state for a reasonable alternative to assist illiterate or poorly educated inmates in preparing petitions for post-conviction relief, the state may not validly enforce a regulation which absolutely bars inmates from furnishing such assistance to other prisoners. Finally, in *Bounds*, the Court held that, where lawyers or paralegals were unavailable to provide assistance to prisoners, the inmates must be given access to a law library to protect access to the courts.

None of these cases support appellants' claim. We begin with *Boddie*. In *United States v. Kras*, 409 U.S. 434, 450, 93 S.Ct. 631, 640, 34 L.Ed.2d 626 (1973), the Court declined "to extend the principle of *Boddie* to the no asset bankruptcy proceeding." The Court reexamined *Boddie*, and noted:

> Mr. Justice Harlin, in his opinion for the Court in *Boddie*, meticulously pointed out, as we have noted above, that the Court went 'no further than necessary to dispose of the case before us' and did 'not decide that access for all individuals to the courts is a right that is, in all circumstances, guaranteed by the Due Process Clause of the Fourteenth Amendment so that its exercise may not be placed beyond the reach of any individual.' (Citation omitted). *The Court obviously stopped short of an unlimited rule that an indigent at all times and in all cases has the right to relief without the payment of fees.*

(Emphasis supplied). *Kras*, 409 U.S. at 451, 93 S.Ct. at 641. The Supreme Court has already explicitly limited

Boddie to its holding; this court, therefore, cannot expand it.

In *Johnson v. Avery*, the plaintiff was incarcerated in a state prison: the Supreme Court held that the state could not absolutely bar him from furnishing assistance to other inmates in the preparation of their petitions for post-conviction relief. The Court based its holding on "... the fundamental importance of the writ of habeas corpus in our constitutional scheme." *Johnson*, 393 U.S. at 484, 89 S.Ct. at 748. In *Bounds v. Smith*, 430 U.S. 817, 828, 97 S.Ct. 1491, 1498, 52 L.Ed.2d 72 (1977), similarly, the Supreme Court held "that the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law."

No stretch of logic can extend those holdings to the case before us now. No one has incarcerated appellants; no one has restricted their opportunity to seek help from family, friends and acquaintances in the preparation of their petitions for divorce.[5] Cases involving inmates simply do not furnish the sort of support necessary for plaintiffs' claims to flourish here.

In *Hooks v. Wainwright*, 775 F.2d 1433, 1436 (11th Cir.1985), moreover, this court made clear that we would not extend the Supreme Court's holding in *Bounds*; we

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[5] In fact, the deposition testimony of Ms. Dunn makes clear that after Ms. Dunn took the "intake form" given to her by Ms. Furman, a friend, Erlene, and Erlene's mother went over the paper with her and tried to explain things to her that she did not unnderstand. She filled out her name, her address and "the certain date that she got married."

noted that "*Bounds* was a limited decision[,]" and commented that "[a]s stated in *Bounds*, access to the courts may be provided in whatsoever manner the state desires." We found it highly unlikely, in fact, that courts could "constitutionally [require] the state to provide legal counsel for the imprisoned, not available as a matter of constitutional right to the unimprisoned in civil cases." *Hooks*, 775 F.2d at 1437 (emphasis supplied). We continued:

> The district court was commendably compassion-ate for the plight of prisoners and their difficulty in getting proper legal help. But prisoners are not alone in that situation. *Vast numbers of the unimprisoned, both convicted and unconvicted, can make a similar case for the need of legal counsel, but to date no constitutional obligation of the state to provide that help has been articulated.*

Id. at 1437. (emphasis supplied). While it is true, in short, that *Boddie v. Connecticut*, *Johnson v. Avery*, and *Bounds v. Smith* all ensure easier access to the courts for certain classes of persons, they do *not* burden the state with a constitutional obligation to provide lay assistance to a narrowly proscribed class of indigents.[6]

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[6] The New York Court of Appeals in *In re Smiley* 36 N.Y.2d 433, 369 N.Y.S.2d 87, 91, 330 N.E.2d 53, 57 (1975), held that in a divorce proceeding an indigent party is not entitled, as a matter of constitutional right, to an attorney. The court stated that "on no view of the matter is counsel required in a matrimonial action as a condition to access to the court. Of course, counsel is always desirable, and in complicated matrimonial litigation would be essential. But however desirable or necessary, representation by counsel is

continued

States have, in fact, traditionally expressed important reasons for controlling the unauthorized practice of law. In *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792, 95 S.Ct. 2004, 2016, 44 L.Ed.2d 572 (1975), to use a widely quoted example, the Supreme Court "recognize[d] that the states have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety and other valid interests they have broad power to establish safeguards for licensing practitioners and regulating the practice of professions." The Florida Supreme Court, in turn, in *State v. Sperry*, 140 So.2d 587, 591 (Fla.1962) has rightly observed that the prohibition of the practice of law is not to "aid or protect the members of the legal profession," but to protect "the public from being advised and represented in legal matters by unqualified persons over whom the judicial department can exercise little, if any, control in the matter of infractions of the code of conduct which, in the public interest, lawyers are bound to observe." *Sperry*, 140 So.2d at 595. Courts traditionally have placed great emphasis on the state's power to regulate the practice of law. We defer to that power now, and find that the plaintiff's attempt in the instant case to strike or curb the state's restrictions on lay assistants on constitutional grounds would lead courts into a quagmire unsupported by *any* directive from any court.

Appellees in this matter relaxed their traditional prohibition against the unauthorized, or unlicensed,

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not a legal condition to access to the courts." Since courts have not held that there is a clear right to counsel in a civil domestic relations case, there is little wonder that no court has held that there exists a constitutional right of access to the courts through an unlicensed lay assistant.

practice of law. We cannot find that they did so under any *constitutional* compulsion. At an oral hearing on December 2, 1985, the original judge in this matter, Judge Melton, engaged in colloquy with counsel for the Florida Supreme Court. At one point, the Court said:

> Now it seems to me through this: that assuming — let's get away from the constitutional ground just a moment. And let's just talk about what's right and what's wrong. It's a problem that I recognize because I've got several volumes here of it already. You have spent a lot of time....
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> Therefore, if we have a problem and the Florida Bar and the Supreme Court and these parties can solve the problem for these people, even though maybe they have — let's assume for the sake of what we're talking about now that they really have no right to it, that there's no constitutional right and really they shouldn't — maybe nothing could be done about it unless somebody does. *What's wrong with correcting a wrong just for the sake of doing something that would be in the best interests of everyone?*
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> Mr. Taylor: *From my personal standpoint, not a thing.*

(emphasis supplied). Judge Melton denied defendants' motion for summary judgment in November, 1989; that same month, the Unlicensed Practice of Law/Access Joint Committee met with the Board of Governors' Committee on Access to the Legal System; the former committee recommended that the latter study and take action regarding access to the courts. Moreover, on February

18, 1987, Mr. Dittman, The Florida Bar's counsel, revealed that Judge Melton's views were reported to the Florida Bar Committees. We conclude that the State Bar and Supreme Court of Florida amended their Bar Rules "...just for the sake of doing something that would be in the best interests of everyone," and we see no reason to doubt the wisdom of their course. We cannot conclude, however, that they were propelled in this direction by any compulsion stronger than the dictates of public policy. We commend appellees on their willingness to explore new directions in their efforts to satisfy various public needs. We hold that considerations of policy and strategy, rather than any constitutional directive, motivated the conduct of the appellees.

IV. CONCLUSION

In sum, we find that appellants' lawsuit played a significant role in obtaining the rule change they desired; they prevailed, despite the ultimate mootness of the controversy, for the purposes of 42 U.S.C. § 1988. Thus we find that appellants satisfied the first prong of the Fifth Circuit's *Leatherbury* test. We do not, however, find that appellants vindicated any civil or constitutional right, as required by this court's opinion in *Doe v. Busbee*; thus the second prong of the Leatherbury test remains unsatisfied. We conclude, therefore, that appellants are not entitled to attorneys' fees under 42 U.S.C. § 1988.

The initial judgment of the district court, showing no entitlement to fees, is therefore

AFFIRMED.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

SERENA DUNN, Individually and WILLIE A. WIGGS and MARVA PAMELLA EVANS, Individually and on behalf if a class of similarly situated individuals, Plaintiffs	)	CIVIL ACTION NO. 83-243-CIV-J-12
THE FLORIDA BAR, et al, Defendants	)	

MEMORANDUM AND ORDER

THOMAS, Senior Judge

Alan B. Morrison is principal attorney for the plaintiffs in this declaratory and injunction action, based on 42 U.S.C. § 1983, which he filed on March 16, 1983 against The Florida Bar and The Florida Supreme Court. Subsequent to events described *infra*, parts I.B. and III.A., the case was dismissed with prejudice on August 27, 1987, subject to the following:

> Plaintiffs' claim a right to attorneys' fees under the provision of 42 U.S.C. § 1988. Defendants deny that

this case involves any rights of the Plaintiffs secured by the United States Constitution and deny that Plaintiffs are prevailing parties. For these and other reasons, Defendants contend that Plaintiffs are not entitled to attorneys fees under 42 U.S.C. § 1988.

As reserved in the Stipulation of Dismissal, Mr. Morrison and other attorneys for the plaintiffs in this class action, on October 26, 1987, submitted their application for $113,606.54 in attorneys' fees and costs in this action, pursuant to 42 U.S.C. § 1988.

The application was briefed. On March 17, 1988 the matter was transferred for hearing and determination of plaintiffs' application for attorneys' fees, from the docket of the Honorable Howell W. Melton to the within judge.[1] On March 17 and 24, 1988, oral hearings were held before this judge, at which argument was heard, testimony received and exhibits admitted. Post-hearing briefs of the parties have been filed, and the case has been submitted.

I.

A.

On March 16, 1983 Serena Dunn, individually and on behalf of a class of similarly situated individuals, filed her complaint for declaratory and injunctive relief against The Florida Bar and The Supreme Court of Florida. In part, she stated

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[1] A Senior district Judge in the Northern District of Ohio, Judge William K. Thomas was sitting by designation in the Middle District of Florida, Jacksonville Division.

> Plaintiff class members are unable to afford the services of attorneys to assist them in obtaining relief which only the State can provide and are also unable, by reason of their illiteracy, blindness, their inability to read and write English, or other handicap to handle their matters *pro se* or with the limited assistance currently allowed to be provided by lay persons under Florida law.

On January 5, 1984, the court denied an earlier motion to dismiss of defendant The Florida Bar. At a class certification hearing of July 3, 1984, the depositions of Serena Dunn and Rosemary Furman were filed in open court. The court continued the hearing on plaintiff's motion for class certification to give counsel for the plaintiff the opportunity to provide the name of a proper representative for a class action. Defendants deposed Willie A. Wiggs and Marva Pamella Evans, as proposed class representatives, on September 6, 1984.

At a hearing on November 15, 1984, the court entered an order granting class certification. The court determined that Willie A. Wiggs and Marva Pamella Evans were adequate representatives of the plaintiff class. As further ordered, plaintiffs Serena Dunn, Willie A. Wiggs and Marva Pamella Evans, on November 28, 1984, filed their third amended complaint for declaratory and injunctive relief. In said Third Amended Complaint plaintiffs allege

> [T]he Supreme Court has determined that lay assistants, such as legal secretaries, may do no more than type verbatim court pleadings that are given to them by their customers. They are forbidden from

> using intake forms to obtain from their customers the information called for in the pleadings, and they may not discuss the papers given them by their customers, even when the papers are incomplete or contain contradictory information. Failure to adhere strictly to these restrictions subjects such lay assistants to injunctive actions, as well as civil and criminal contempt proceedings, brought by the defendants.

Plaintiff Serena Dunn states that she was married to Anthony L. Dunn on February 3, 1982. Shortly thereafter, "he began physically abusing her," and in July 1982 she decided to seek a dissolution of their marriage and protection from the Florida courts. She further states

> On July 7, 1982, plaintiff Dunn went to the offices of Rosemary Furman, a legal secretary, to obtain assistance in preparing the papers needed for the dissolution of her marriage. At that time, Ms. Furman believed that she was permitted to use written intake forms to service her customers, but plaintiff Dunn was unable even to read and comprehend the written instructions for Ms. Furman's intake form and provide the necessary information in writing.

The plaintiffs further allege that "Ms. Furman was therefore required to refuse to assist the plaintiff Dunn, and did in fact refuse to assist her, despite the fact that plaintiff Dunn is unable to afford the services of an attorney and there are no lawyers available to serve her on a *pro bono* or reduced fee basis."

Plaintiffs Wiggs and Evans allege that they bring their action on behalf of a class of similarly situated

individuals, consisting of all present and future residents of the Fourth Judicial Circuit of Florida

(a) who either presently desire, or in the future may desire, to exercise their fundamental right to obtain a dissolution of marriage;

(b) who are unable to exercise their right to do so without the assistance of another person because they lack the skills, knowledge, familiarity with the court system, self-confidence, and other abilities required to appear *pro se*;

(c) who are not eligible to utilize the simplified dissolution of marriage procedures in Rule 1.611(c) of the Florida Rules of Civil Procedure which entitle them to the assistance of the Clerk of the Court in obtaining a dissolution of marriage

(d) who are unable to obtain the services of a lawyer because they cannot afford to pay the charges of a lawyer and because no lawyers are available to serve them on a *pro bono* or reduced fee basis; and

(e) who are able to afford the services of persons who, although not members of the Bar, are able to provide them the assistance they need to obtain a dissolution of their marriage and for which they charge members of the plaintiff class an amount which the class members can afford; but who are unable to utilize the services of such lay assistants because of the restrictions against lay assistants providing such services which are enforced by defendants.

Plaintiffs further allege that plaintiff Wiggs went to the office of Ms. Furman on June 1, 1984 to obtain assistance in preparing the papers needed for the dissolution of his marriage. Papers were prepared for plaintiff Wiggs "but his wife refused to sign them, and hence he returned to Ms. Furman's office for additional assistance." Ms. Furman then "determined that she could not lawfully assist him and refused to provide him the assistance that he needed, despite the fact that plaintiff Wiggs is unable to afford the services of an attorney and there are no lawyers available to serve him on a *pro bono* or reduced fee basis."

As to new party plaintiff Marva Pamella Evans, the Third Amended Complaint states

> On July 10, 1984, plaintiff Evans went to the office of Ms. Furman to obtain assistance in preparing the papers needed for the dissolution of her marriage. At that time, Ms. Furman determined that she could not lawfully assist plaintiff Evans and refused to provide her the assistance that she needed, despite the fact that plaintiff Evans is unable to afford the services of an attorney and there are no lawyers available to serve her on a *pro bono* or reduced fee basis.

In addition to the Third Amended Complaint, the orders of the court and docket entries, the record is deemed to comprise plaintiffs' depositions, Rosemary Furman's deposition, exhibits received at the March 24, 1988 hearing, the briefs of the parties filed at all stages of the case, and any admissions of the parties.

I.
B.

The Florida Bar and The Florida Supreme Court filed separate motions for summary judgment on September 27, 1985 and October 2, 1985; and the plaintiffs filed a consolidated response on October 18, 1985. On December 2, 1985 the court conducted an oral hearing. At the hearing the court engaged in extensive colloquy with counsel about the right or wrong of permitting limited conversations between a lay assistant and customer about correcting mistakes in entries filled into blanks in divorce forms.

On November 10, 1986 the court entered its order on the defendants' summary judgment motions. The court denied the motion of each defendant. The court's treatment of the constitutional issue, which he defined in his order, is examined *infra* part II.B.

On February 18, 1987 the court conducted a status conference. Trial was set for October 13, 1987, but the plaintiffs' voluntary dismissal of the case on August 27, 1987 mooted the trial. Thus, the constitutional question which the court had posed in his order of November 10, 1986 was not resolved.

In and after November, 1986, The Florida Bar Committee on Access to the Legal System drafted a proposed amendment to Supreme Court Rule 10-1.-1(b), Rules Governing the Investigation and Prosecution of the Unlicensed Practice of Law. The Florida Bar Board of Governors approved the proposal on March 20, 1987. Official notice of the proposed amendment was brought to the Supreme Court's attention on March 25, 1987, and the

proposed amendment was published in the April 1, 1987 issue of Florida Bar News. It read

> UPL. The unlicensed practice of law, as prohibited by statute, court rule, and case law of the State of Florida. For purposes of this chapter, it shall not constitute the unlicensed practice of law for nonlawyers to engage in limited oral communication to assist individuals in the completion of legal forms approved by The Supreme Court of Florida. Oral communication by nonlawyers is restricted to those communications essential to elicit factual information necessary for the completion of the form(s) and inform the individual how to file such form(s).

On June 9, 1987, plaintiffs' counsel submitted comments to the Supreme Court "on behalf of Serena Dunn and the other members of the certified plaintiff class in the case of *Serena Dunn, et al v. The Florida Bar, et al*, No. 83-243-CIV.-J-12... pending before the Honorable Howell W. Melton, United States District Judge for the Middle District of Florida, Jacksonville Division." Mr. Morrison declared

> If this Court's restrictions on lay assistance were removed, the members of the plaintiff class in *Dunn* could afford to hire these lay persons, since they charge much less than lawyers, and this would enable them to exercise their fundamental constitutional right to obtain dissolutions of their marriages.
>
> ...

> In our view, the Bar's petition is definitely a step in the right direction, and we urge the court to support its general thrust. However, we are troubled by some of the restrictions contained in it, and we urge the court to modify them.
>
> [W]e believe that the word "essential" should be changed to "reasonably necessary," which would largely eliminate the *in terrorem* effect that now appears. Along the same lines, we believe that the phrase "necessary for the completion of" is also unduly threatening, and we urge that it be changed to "to complete." In the interest of clarity and consistency we would also change the sentence to plural from singular.

The Court was further asked to clarify the final portion relating to informing the individual "how to file such forms(s)." Counsel stated

> Given the purpose of this rule change, we believe that The Bar intended, and the Court should make it clear, that non-lawyers may tell the individuals, for example, how many copies must be filed, what the filing fees are, what is the proper method of payment, how long the typical period is before a hearing will be scheduled, and other matters of a routine administrative nature that are necessary to assure that the matter goes forward, but are hardly the types of information which the rules on the unlicensed practice of law were intended to be conveyed only by members of The Bar.

On July 9, 1987, The Supreme Court of Florida issued a *per curiam* under the caption "The Florida Bar Re Amendment to Rules Regulating The Florida Bar (Chapter 10)." The *per curiam* began

> The Florida Bar has petitioned this Court to amend chapter 10 of the Rules Regulating The Florida Bar regarding the unlicensed practice of law. The proposed amendments redefine the unlicensed practice of law and move that definition to another location within chapter 10. The bar submits that the new definition will be beneficial by providing better access to the courts while continuing to protect the public from persons not competent to give legal advice.

Continuing,

> Comments to the proposed amendment have been filed by an attorney representing a class of plaintiffs who wish to dissolve their marriages but who cannot afford a lawyer, who are ineligible for legal aid, who cannot currently be assisted by clerks of court, and who are unable to prepare the required papers by themselves. These comments propose alternative language for the second full sentence of the bar's amendment and ask that this Court clarify that nonlawyers may tell individuals, for example, the number of copies to be filed, the amount of filing fees, the proper method of payment, the time period before a hearing will be scheduled, and other matters of a routine administrative nature necessary to assure that the matter goes forward. At oral argument the

bar's representative stated that the bar has no objections to these comments and suggestions.

Further continuing

After considering this matter, we adopt the bar's proposal, as amended by the comments we have received. We also hold that nonlawyers can give information regarding routine administrative matters. Therefore, rule 10-1.1(b) is added, to read as follows, paragraphs (b) through (d) of rule 10-1.1 are renumbered as paragraphs (c) through (e), and rule 10-7.1(a)(5) is deleted, effective immediately.

Definition of UPL. The unlicensed practice of law, as prohibited by statute, court rule, and case law of the State of Florida. For purpose of this chapter, it shall not constitute the unlicensed practice of law for nonlawyers to engage in limited oral communications to assist individuals in the completion of legal forms approved by the Supreme Court of Florida. Oral communications by nonlawyers are restricted to those communications reasonably necessary to elicit factual information to complete the form(s) and inform the individual how to file such form(s).

On July 27, 1987, Mr. Morrison wrote C. Harris Dittmar, Esq., counsel for The Florida Bar, and Mr. Eric J. Taylor, Esq., Assistant Attorney General, Department of Legal Affairs, counsel for the Supreme Court. In part, counsel stated

> As I am sure you are aware by now, the Supreme Court of Florida issued an opinion on July 9, 1987, adopting significant changes to the rules defining the unlicensed practice of law. We had submitted comments on those rules, and when the Bar did not object, the Court went along with them. Based upon this change in the rules, which was initiated by the Bar and approved by the Supreme Court of Florida, plaintiffs have now obtained substantially all of the relief which they had sought and, accordingly, there is no reason for them to continue the case. Therefore, I propose that we enter a stipulation dismissing the case with prejudice, save only for the matter of attorneys' fees.

After discussing the matter of attorneys' fees, he stated that he had drafted a stipulation of dismissal "which reserves everyone's rights with respect to fees, establishes a deadline for our fees submission, gives you 30 days to respond, and otherwise dismisses the case with prejudice." Thereafter, a revised stipulation of dismissal with prejudice was filed in the case, "subject to" the parties' positions on attorney fees, set forth *supra* p. 1.

II.

A.

Plaintiffs make their application for attorneys' fees pursuant to 42 U.S.C. § 1988, which, in pertinent part, provides: "In any action or proceeding to enforce a provision of [section 1983], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the cost."

Before reaching the prevailing party requirements, which the plaintiffs must satisfy, the court takes up the defendants' contention that plaintiff's action, based on 42 U.S.C. § 1983, lacks a constitutional basis. Plaintiffs brought their suit under section 1983, which creates a right of action in law or in equity to address a deprivation of any right secured by the constitution and laws of the United States.

Defendants assert that "[p]laintiffs still will not address the issue of a lack of a violation of an established constitutional right in this case."

> Defendants concede that "a prevailing party" can be awarded attorney's fees. But the purpose behind Congress' enactment of 42 U.S.C. § 1988 is a recompense to a plaintiff for the attorney's fees expended for the "vindication of a federal constitutional or statutory right." *Maher v. Gagne*, 448 U.S. 122 (1980); *Martin v. Heckler*, 773 F.2d 1145 (llth Cir. 1985).[2]

Respondent Gagne alleged in her complaint

> Defendants' practice and policy constitute an invidious discrimination against persons whose work-related expenses exceed the allowances set forth in Index 332.31 and violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution by forbidding plaintiff and the

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[2] The language "vindication of a federal constitutional or statutory right," attributed to *Maher*, has not been found in the Court's decision.

> class she represents [working recipients of AFDC benefits] ever from controverting the presumption that their work-related expenses exceeding the transportation and food allowances of Index 332.31 are reasonable.

Maher, n.5. Respondent Gagne's complaint also claimed that defendants' practice and policy violated the Due Process Clause of the Fourteenth Amendment.

Petitioner, Administrator of Connecticut's Aid to Families with Dependent Children Program, amended the AFDC regulations, while discovery was underway, to authorize a deduction for all reasonable work-related expenses. After almost a year and a half interval, respondent filed an amended complaint "alleging that actual expenses in excess of certain standard allowances were still being routinely disallowed." *Id.* at 126. A settlement was negotiated and a consent decree was entered that, in part, provided for a substantial increase in the standard allowance and "gave AFDC recipients the right to prove that their actual work-related expenses were in excess of the standard."[3] *Id.*

After an adversary hearing, the District Court awarded an attorney's fee to respondent Gagne's counsel. The court held that the respondent was "the prevailing party" within the meaning of section 1988 because, without prevailing "in every particular" she had won "substantially all of the relief originally sought in her

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[3] The Court noted that the consent decree "did not purport to adjudicate respondent's statutory or constitutional claims." The decree stated that "[n]othing in this Consent Decree is intended to constitute an admission of fault by either party to this action." *Maher*, n.8.

complaint" in the consent decree. The court rejected the petitioner's argument that the Eleventh Amendment barred fees in the "absence of a judicial determination that the respondent's constitutional rights had been violated." The Court of Appeals affirmed; and the Supreme Court granted *certiorari* to consider "both the statutory[4] and constitutional claims."

The Court found "no merit in petitioner's suggestion that respondent was not the prevailing party within the meaning of 1988." The Court held

> The fact that respondent prevailed through a settlement rather than through litigation does not weaken her claim to fees. Nothing in the language of § 1988 conditions the District Court's power to award fees on full litigation of the issues or on a judicial determination that the plaintiff's rights have been violated. Moreover, the Senate Report expressly stated that "for purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief. S.Rep. No. 94-1101, p. 5 (1976).

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[4] Not directly pertinent to the present case, the Court rejected petitioner's argument that "Congress did not intend to authorize the award of attorney's fees in every type of § 1983 action, but rather limited the court's authority to award fees to cases in which § 1983 is invoked as a remedy for a constitutional violation or a violation of a federal statute providing for the protection of civil rights or equal rights." In doing so, the court followed *Maine v. Thiboutot* , decided the same day, 448 U.S. 1 (1980), holding that § 1988 applies to all types of "§ 1983 actions, including actions based solely on Social Security Act violations." *Maher* at 128.

Id. at 129.

Petitioner Maher argued that "regardless of Congress' intent, a federal court is barred by the Eleventh Amendment from awarding fees against a State in a case involving a purely statutory, non-civil-rights claim." Rejecting the argument, the Court stated

> In this case, there is no need to reach the question whether a federal court could award attorney's fees against a State based on a statutory, non-civil-rights claim. For, contrary to petitioner's characterization, respondent did allege violations of her Fourteenth Amendment due process and equal protection rights, which the District Court and the Court of Appeals both held to be sufficiently substantial to support federal jurisdiction under *Hagans v. Lavine*, 415 U.S. 528.

Id. at 130.

Directly pertinent to the present threshold question the Court then noted

> Although petitioner is correct that the trial judge did not find any constitutional violation, the constitutional issues remained in the case until the entire dispute was settled by the entry of a consent decree. Under these circumstances, petitioner's Eleventh Amendment claim is foreclosed by our decision in *Hutto v. Finney*, 437 U.S. 678.

Id. at 131.

The Court agreed

> with the courts below that Congress was acting within its enforcement power [Fourteenth Amendment, § 5] in allowing the award of fees in a case in which the plaintiff prevails on a wholly statutory, non-civil-rights claim pendent to a substantial constitutional claim or in one in which both a statutory and a substantial constitutional claim are settled favorably to the plaintiff without adjudication.

Id. at 132.

Thus, adjudication of a constitutional claim is not a prerequisite to establishing prevailing party status.[5]

In *Hewitt v. Helms*, 107 S.Ct. 2672, 2673 (1987), the Court, in determining prevailing party status, restated the section 1988 interpretation of *Hanrahan v. Hampton*, 446 U.S. 754, 757, 100 S.Ct. 1987, 1989, 64 L.Ed. 670 (1980)

> Respect for ordinary language requires that a plaintiff receive at least some relief on the merits of his claim before he can be said to prevail.

Hewitt also reaffirms the result and does not retract any of the reasoning of *Maher v. Gagne*

> Helms obtained no relief. Because of the defendant's official immunity he received no damages award. No

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[5] Justice Powell dissented in *Thiboutot* . Yet he concurred in *Maher v. Gagne*, at 133-5, because "the complaint included a substantial constitutional claim which 'remained in the case until the entire dispute was settled by the entry of a consent decree.' *Ante*, at 131."

> injunction or declaratory judgment was entered in his favor. Nor did Helms obtain relief without benefit of a formal judgment—for example through a consent decree or settlement. *See Maher v. Gagne*, 448 U.S. 122, 129, 100 S.Ct. 2570, 2575, 65 L.Ed. 653 (1980).

Consistent with *Maher v. Gagne*, the Eleventh Circuit, in *Doe v. Busbee*, 684 F.2d 1375, 1379 (llth Cir. 1982),[6] acknowledged, "as the legislative history notes, parties may be considered to have prevailed when they *vindicate* rights through a consent judgment or without formally obtaining relief. S.Rep. No. 94-1011, at 5 (emphasis added)." The Court further noted

> For example, a party may be considered to be "prevailing" if the litigation successfully terminates by a consent decree, an out-of-court settlement, a voluntary cessation of the unlawful practice by the defendant, or other mooting of the case where the plaintiff has vindicated his right.

Doe v. Busbee noted among Fifth Circuit "prevailing party" cases *Iranian Students Association v. Sawyer*, 639

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[6] *Casines v. Murchek*, 766 F.2d 1494, 1503 (llth Cir. 1985), recognizes the *Doe v. Busbee* "prevailing party" test stated at page 1381

> [I]n order to be a prevailing party, a plaintiff must achieve significant relief to which [s]he was entitled under the civil rights laws through [her] success on the merits, favorable settlement, or voluntary actions by the defendants....However, consistent with the policy underlying section 1988, the plaintiff must in some way vindicate a civil right at issue in the litigation against the violator of that civil right in order to be considered a 'prevailing party.'

F.2d 1160 (5th Cir. 1981). A party prevails "if their lawsuit was a significant catalytic factor in achieving the primary relief sought through litigation despite failure to obtain formal judicial relief." *Iranian Students* at 1163. In *Iranian Students*, in note 6 at 1164, the court observes

> Although it is true no fees could be awarded had the court ruled no rights were violated, it would be ineffectual to require the court to hear the complete litigation on a matter already moot. It is enough to meet the legal requirements to be sure the litigation is not "frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so." *Christiansburq Garment Co. v. E.E.O.C.*, 434 U.S. 412, 422, 985 S.Ct. 694, 701, 542 L.Ed. 2d 648 (1978).

A year later, another Fifth Circuit panel stated a similar threshold requirement in a larger context in *Williams v. Leatherbury*, 672 F.2d 549, 551 (5th Cir. 1982)

> Indeed, a defendant may unilaterally undertake action that moots the suit. In such a case, a plaintiff may still recover attorney's fees if he can show both a causal connection between the filing of the suit and the defendant's action and that the defendant's conduct was required by law, i.e. not a wholly gratuitous response to an action that in itself was frivolous or groundless. (citations omitted).

Adding to this formulation, *Garcia v. Guerra*, 744 F.2d 1159, 1163 (5th Cir. 1984) declares that "[a] claim is not

frivolous if it is arguably supported by case or statutory law." Concurring, Judge Randall faulted the panel for "considering the merits of the issue at all. Under the *Leatherbury* standard, the panel should have held only that the appellant's claim was colorable, while intimating no opinion on its merits." *Garcia* at 1166. It is evident that Judge Randall used a "colorable claim" as interchangeable with a claim that is "arguably supported by case or statutory law."

Based on *Doe v. Busbee*'s acceptance of *Iranian Students* it is concluded that the Eleventh Circuit would also accept and apply these similar Fifth Circuit holdings in deciding whether a section 1983 litigant has shown threshold entitlement to resort to the section 1988 attorney's fee statute. These cases generally support the plaintiff's position, in their last brief, that it is "enough to show that he had a colorable constitutional claim," However, this court holds that a "colorable claim" is one that is "arguably supported by case or statutory law."

II.
B.

The plaintiffs "recognize that defeating a motion for summary judgment is not sufficient to satisfy the requirement that a plaintiff prevail in order to be entitled to a fee, but [they] are not relying upon the defeat of the motions for summary judgment for that purpose." Rather, they say "[t]he defeats of the motions for summary judgment are relevant solely to establish that plaintiffs had a substantial constitutional claim and hence had met this threshold." Defendants counter

> These Defendants submit that the Plaintiffs have failed to establish, through any means, that there exists a constitutional right of access to the courts through an unlicensed lay assistant. They have not even attempted to show that such a "right" is available or that any court has ever addressed the issue as applied to a class like the Plaintiffs'.[7]

Continuing

> The Plaintiffs instead, attempt to bootstrap their conclusory statements of the existence of such a right by stating that they overcame a motion to dismiss and a motion for summary judgment and, therefore, such a right must exist. While the Plaintiffs do not rely upon these denials to "satisfy the requirement that a plaintiff prevail in order to be entitled to a fee", they rely on the denials to "establish that plaintiffs had a substantial constitutional claim."

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[7] The New York Court of Appeals in *In re Smiley* , 36 N.Y.2d 433, 330 N.E.2d 53, 57 (1975), held that in a divorce proceeding an indigent party is not entitled, as a matter of constitutional right, to a court appointed attorney. The court stated that "on no view of the matter is counsel required in a matrimonial action as a condition to access to the court. Of course, counsel is always desirable, and in complicated matrimonial litigation would be essential. But however desirable or necessary, representation by counsel is not a legal condition to access to the courts." This decision is more persuasive than the short unanalyzed holding in *Bradley v. Jones* , 297 So.2d 198 (La. 1974). In any event, since courts have not held there is a clearcut right to counsel in a civil domestic relations case, it is no wonder that no court has held that "there exists a constitutional right of access to the courts through an unlicensed lay assistant."

In its motion for summary judgment, the Florida Bar argued that the United States Supreme Court's dismissal of the appeal in *Furman v. The Florida Bar*, 444 U.S. 1061 (1980), constituted an adjudication, adverse to the present plaintiffs, on the merits of the constitutional issue presented there and claimed here. As set forth in *Furman*'s Supreme Court jurisdictional statement, that issue was "[w]hether a state may constitutionally apply its otherwise valid rules prohibiting the unauthorized practice of law to preclude indigents from utilizing lay services that are essential to exercise the fundamental right to obtain a divorce."

Judge Melton recognized that the "same constitutional argument is made in the present [*Dunn*] case." However, he concluded that the Supreme Court's dismissal of the *Furman* appeal may have had an alternative basis, namely that the "appellant [Furman] lacked standing to raise the rights of indigents as a defense in an action brought against her by the state." Based on Supreme Court authorities he examined, he determined "it would appear highly plausible that the *Furman* appeal was dismissed on the basis of standing, rather than on any substantive ground." Finding that the *Furman* dismissal has no "precedental impact" he denied The Florida Bar's motion for summary judgment. Given the nature of this ruling, Judge Melton's denial of The Florida Bar's motion for summary judgment does not "establish" that in the Third Amended Complaint "the plaintiffs had a substantial constitutional claim."

Judge Melton began his consideration of The Florida Supreme Court's motion for summary judgment by reciting its arguments. He then stated

> As can be discerned from the general nature of these arguments and from the fact that the Florida Supreme Court has presented no supporting affidavits attacking the factual predicate of plaintiffs' claim, this motion for summary judgment is tantamount to a motion to dismiss for failure to state a claim upon which relief can be granted, and the Court will analyze the motion accordingly.

The court next observed that similar arguments were raised in the Florida Bar's earlier motions to dismiss the plaintiffs' amended complaint (which he denied on January 5, 1984). He stated that "in so doing, the Court implicitly rejected these contentions" and had no reason "to revisit its previous ruling." In that earlier ruling no constitutional issue was expressly considered or resolved. In one sentence it adjudged that "the motion to dismiss filed by defendants The Florida Bar and James C. Rinaman, Jr., as President of The Florida Bar, is hereby denied." This court concludes that he may not regard, and he will not treat that denial as establishing that "the plaintiffs had a substantial constitutional claim."

In his order of November 10, 1986, Judge Melton then declared

> Even if the Court were not bound by its earlier ruling on these arguments, it would nonetheless deny the Florida Supreme Court's motion. As mentioned in section one of this Order, the issue presented in this case is the constitutionality of Florida's laws precluding lay assistants from aiding members of the plaintiff class in obtaining dissolution of their marriages.

He thus defined, but did not attempt to decide the constitutional question in the case

> In addressing this constitutional question, the Court faces at least one major factual question: whether the members of the plaintiff class have actually been denied access to the courts based on a state created barrier.

Culminating his ruling, Judge Melton declared

> Because this question requires an examination of the practical results of the challenged regulations, and because the access issue will in this case be a question of degree, the Court is of the opinion that this case cannot be decided until after the presentation of evidence.

By ruling that he could not resolve the constitutional question until he addressed the stated factual question, it is plain that the court made no ruling on the constitutional question. Hence, there is no support for the plaintiffs' arguments

> The defeats of the motions for summary judgment are relevant solely to establish that plaintiffs had a substantial constitutional claim and hence had met this threshold.

The "major factual question" shaped by Judge Melton refers to "access to the courts" and whether members of the plaintiff class have been denied that "access to the

courts based on a state created barrier." The question of "access" may be answered on the facts stated in the Third Amended Complaint as modified by the deposition testimony of the plaintiffs.

Plaintiffs allege that the Supreme Court has determined that lay assistants "may not communicate orally with their customers and must obtain all information from their customers in writing." Plaintiffs further allege that "Plaintiff Dunn was unable even to read and comprehend the written instructions for Ms. Furman's intake form and provide the necessary information in writing." However, the deposition testimony of Ms. Dunn makes clear that she took the "intake form," given to her by Ms. Furman, and then a friend, Erlene, and Erlene's mother went over the piece of paper with her and tried to explain things to her that she did not understand. She filled out her name, her address and "the certain date that [she] got married." She also included her husband's name. Rather than "refuse to assist" Ms. Dunn, as claimed in the Third Amended Complaint, Ms. Furman, according to Ms. Dunn, said that "the only thing she could do was see what she could do."[8]

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[8] Ms. Furman, in her depositon, testified that she told Ms. Dunn "I can give you written material, I can give you typed material, but I cannot answer your questions. Take these away and have someone read them to you." She further testified that "if [Ms. Dunn] can find some way that she can get the information on this sheet, I will do the divorce." However, she did not testify that Ms. Dunn returned the completed papers to her. Even if this were regarded as contradicting Ms. Dunn it cannot diminish the binding effect of plaintiff Dunn's statements of what occurred.

Thus, it is evident that The Florida Supreme Court's unauthorized [unlicensed] practice of law rules, and The Supreme Court's then prohibition of oral communications between lay assistants and their customers, actually did not prevent Ms. Dunn although partially illiterate, from getting a friend to help her fill out the divorce "intake form" furnished her by Ms. Furman. Moreover, enforcement of such rules, as they relate to lay assistants, did not prevent Ms. Dunn from returning the completed divorce "intake form" to Ms. Furman, or prevent Ms. Furman from preparing and filing the divorce papers in court. Also, it appears that other illiterate persons seeking a divorce, with the help of family or friends, would be able to fill out the divorce "intake forms." Once filled out, the divorce "intake form" would permit the lay assistant to prepare and file the divorce papers in court. In view of Ms. Dunn's admissions, any claimed class of illiterate or indigent persons is not shown to be denied access to court to file divorce papers through the inability to use a lay assistant.

The deposition testimony of Willie Wiggs, similarly indicates that he was able to complete the divorce "intake form" provided him by Ms. Furman. His testimony further reveals that when his wife returned the unsigned papers to him (which prevented use of the simplified dissolution of marriage procedure) he took them to Ms. Furman. She said "I'm going to have to hold these." Since the papers were completed there was no apparent reason for Ms. Furman not proceeding to file divorce papers for Mr. Wiggs. He had paid her $50, her standard fee, and an extra fee of $25. Hence, it is concluded that, on his own admissions, he cannot contend that The Supreme Court's enforcement of the

unauthorized (unlicensed) practice of law rules prevented his access to the divorce court of the Fourth Judicial Circuit of Florida, through a lay assistant, to file a divorce action against his wife.

As to the third plaintiff, Marva Pamella Evans, her deposition testimony reveals that she engaged Ms. Furman, that she paid Ms. Furman her fee and that she filled out forms on divorce which she understood and gave a copy to Ms. Furman. However, she did not receive back from Ms. Furman a document "all typewritten and set to go to the court here in Florida." Moreover, it is possible that "her husband might go with her down to the courthouse and sign the papers for her to get a divorce." Based on her admissions, it is not clear that Ms. Furman cannot assist Evans in filing a simplified dissolution of marriage petition. In short, on her own deposition admissions, plaintiff Evans has not shown that she has been denied access to divorce court, through employment of a lay assistant.

Summarizing this section, even if one assumes the validity of the constitutional theory that the plaintiffs have sought to advance, the deposition admissions of the three plaintiffs fail to support the Third Amendment factual claims or statements which are asserted in support of that constitutional theory. If a complaint allegation is at odds with the deposition testimony of a plaintiff, the court must accept the testimony. Plaintiffs are bound by sworn deposition testimony when it varies from a complaint allegation.

In the next section the plaintiffs' constitutional theory is evaluated.

II.
C.

In his application for attorneys' fees, Alan Morrison states

> During the course of my representation of Ms. Furman, I developed the core legal theory upon which this lawsuit was based: That under cases such as *Boddie v. Connecticut*, 401 U.S. 371 (1971), and *Johnson v. Avery*, 393 U.S. 483 (1969), the state may not constitutionally deny access to the legal system to those unable to pay for matters such as a divorce over which the state had a monopoly, and that the rules on unauthorized practice of law created, for those who were unable to afford legal services, precisely the same kind of barriers to access that the Supreme Court struck down in *Boddie* and *Johnson*.

In its post-hearing brief defendant Supreme Court urges

> The only cases cited by the plaintiffs did not address the issues raised here. *Avery v. Johnson*, 393 U.S. 483 (1969) concerned the right of access to contest the status of confinement by incarcerated persons and *Bod[d]ie v. Connecticut*, 401 U.S. 371 (1971) dealt with the *direct* blocking of the courthouse door to *pro se* litigants themselves through the use of a filing fee. Plaintiffs want to elevate these cases to apply to, at best an indirect barrier to the Plaintiffs' access to the courts, for they do not allege that the defendants are directly stopping them from getting a divorce.

In *Boddie*, the issue was the constitutionality of a Connecticut statute whose service of process provisions required payment of court fees and expenses as a condition precedent to obtaining court relief. The Court held

> In concluding that the Due Process Clause of the Fourteenth Amendment requires that these appellants be afforded an opportunity to go into court to obtain a divorce, we wish to re-emphasize that we go no further than necessary to dispose of the case before us, a case where the *bona fides* of both appellants' indigency and desire for a divorce are here beyond dispute...Thus we hold only that a State may not, consistent with the obligations imposed on it by the Due Process Clause of the Fourteenth Amendment, pre-empt the right to dissolve this legal relationship without affording all citizens access to the means it has prescribed for doing so.

Id. at 382, 383.

In *Logan v. Zimmerman Brush Company*, 455 U.S. 422 (1982) the Court, at 430 n.5, noted that in *Boddie* "the States' imposition of substantial filing and other fees upon indigents seeking divorces was held to deny them due process." Manifestly, the State of Florida has not imposed "substantial filing and other fees upon indigents seeking divorces." Indeed, plaintiffs do not deny that indigents have access to Florida divorce courts to proceed *pro se* and without the payment of filing fees.

What the plaintiffs are endeavoring to do is to extend *Boddie* to establish the constitutional theory advanced by their counsel. However, the Supreme Court, itself, has

pointed out that *Boddie* should not be extended beyond its actual holding. In *United States v. Kras*, 409 U.S. 434, 450, 451 (1973) the Court declined "to extend the principle of *Boddie* to the no asset bankruptcy proceeding." In support of its decision, the Court re-examined *Boddie*

> Mr. Justice Harlan, in his opinion for the Court in *Boddie*, meticulously pointed out, as we have noted above, that the Court went "no further than necessary to dispose of the case before us" and did "not decide that access for all individuals to the courts is a right that is, in all circumstances, guaranteed by the Due Process Clause of the Fourteenth Amendment so that its exercise may not be placed beyond the reach of any individual." 401 U. S. at 382-383. The Court obviously stopped short of an unlimited rule that an indigent at all times and in all cases has the right to relief without the payment of fees.

In view of the Court's express limitation of the breadth of *Boddie* to its actual holding, it is concluded that *Boddie* may not be extended to validate the plaintiffs' constitutional theory. Connecticut's imposition of costs in *Boddie* directly blocked access to indigents seeking marriage dissolution in its courts. The barrier charged here is not clear cut. The claimed barrier consists of an uncertain challenge to Florida's regulation of lay assistants' possible illegal practice of law.

In their Third Amended Complaint, plaintiffs say that "[a]s a result of the combination of [plaintiffs'] limited resources and the Florida restrictions on lay assistants, plaintiffs and the other members of the plaintiff class are

precluded from exercising their fundamental right to obtain a dissolution of their marriages, over which Florida maintains a monopoly." The alleged interference with indigents' access to the Florida courts to seek dissolution of their marriages thus turns on indigents' use of lay assistants whose activities are admittedly subject to the Supreme Court's jurisdiction in regulating the unauthorized (unlicensed) practice of law.

In *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975), the Court recognized that "the States have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety, and other valid interests they have broad powers to establish standards for licensing practitioners and regulating the practice of professions." *Citing Goldfarb and Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), The Florida Supreme Court, in *Florida Bar v. Brumbaugh*, 355 So.2d 1186 (Fla. 1978), sought to balance its responsibility to regulate the unauthorized practice of law by lay assistants with the right of all citizens to have access to Florida courts to represent themselves, guaranteed by Article I, Section 21 of the Florida Constitution (1968), and by *Faretta v. California*, 422 U.S. 806 (1975). The court, in *Florida Bar v. Brumbaugh* at 1191, observed that "persons not licensed as attorneys are prohibited from practicing law within this state" but that "it is somewhat difficult to define exactly what constitutes the practice of law in all instances." Yet, it has done so in *State v. Sperry*, 140 So.2d 587, 591 (Fla. 1962). At the same time, it observed that the prohibition of the practice of law by those not examined and found qualified is not to "aid or protect the members of the legal profession." It is done

> to protect the public from being advised and represented in legal matters by unqualified persons over whom the judicial department can exercise little, if any, control in the matter of infractions of the code of conduct which, in the public interest, lawyers are bound to observe.

State v. Sperry at 595.

Given The Florida Supreme Court's power, and the public need of the Court's power, to regulate both the authorized and the unauthorized practice of law, plaintiffs' attempt to extend *Boddie* to strike down or curb the Florida's restrictions on lay assistants is misconceived and misdirected.

As seen, *Boddie* deals with access to Connecticut's courts, "the sole means in Connecticut for obtaining a divorce." Since access to Florida's courts to obtain marriage dissolution is the subject of *Dunn*, the present case, *Boddie*, as a matter of facial impression, may have appeared to plaintiffs' counsel to be relevant in developing his constitutional theory. But, analysis shows that *Boddie* does not warrant or justify that theory. Additionally, with due deference to the ingenuity of plaintiffs' counsel in developing constitutional theory, the incarcerated status of plaintiffs in *Johnson v. Avery*, 393 U.S. 483 (1969), limits that case's applicability to prison situations. The case cannot support counsel's theory. It held that "unless and until the State provides some reasonable alternative to assist inmates in the preparation of petitions for post-conviction relief, it may not validly enforce a regulation such as that here in issue,

barring inmates from furnishing such assistance to other prisoners." *Id.* at 490.

Boddie v. Connecticut and *Johnson v. Avery* are the only cases counsel has cited to support his contention that the Third Amended Complaint is "enough to show that he had a colorable constitutional claim." Treating a "colorable claim" as one that is "arguably supported by case or statutory law," these cases do not "arguably" support the plaintiffs constitutional claim.

Hence, it is concluded that plaintiffs have not established their threshold entitlement to attorneys' fees under section 1988. Nevertheless, the court will proceed to rule upon the other requirements of section 1988, which rulings would become timely and controlling if the court were reversed on the threshold entitlement ruling.

III.

A.

Part I.B. sets forth, *supra* at pp. 9; 10, The Florida Supreme Court *Per Curiam* of July 9, 1987 revision of the Court's Unlicensed Practice of Law Rule. Part I.B. also reviews certain events that preceded the Rule adoption. Based on these events, plaintiffs assert that "this case is the clear 'but for' catalyst that caused the Rule change, but the Court need not go that far, since this case was plainly a substantial factor, and that is all that is required in order for plaintiffs to become prevailing parties." Plaintiff cites *Taylor v. City of Fort Lauderdale*, 810 F.2d 1551, 1560 (llth Cir. 1987)

> Analysis [of the prevailing party question] hinges upon whether "the lawsuit is a substantial factor or a

> significant catalyst in motivating defendants to end their unconstitutional behavior." [*Doe v. Busbee*, 684 F.2d 1375, 1380 (llth Cir. 1982).]

Relying on *Taylor* and the same language, defendant The Florida Bar argues

> Even if the Court finds that the rule change by The Florida Supreme Court gave the plaintiffs substantially what they sought, this is not enough to declare plaintiffs "prevailing parties" unless "the lawsuit is a substantial factor or a significant catalyst in motivating defendants to end their unconstitutional behavior." *Taylor*...Thus, plaintiffs must show a *direct causal relationship* between their lawsuit and the actions of the defendant. *Hewitt v. Helms*, 107 S.Ct. 2672, 2677 (1987).

Defendant, The Florida Bar, points to the "ongoing efforts of The Bar and The Florida Supreme Court to deal with the difficult issue of access to the courts." It also notes that Justice Ben F. Overton of The Florida Supreme Court testified at the March 24, 1988 hearing "concerning the substantial efforts of The Supreme Court and The Florida Bar to improve access to the courts."

Here are the most relevant of the Bar cited actions of The Supreme Court and The Bar. In *Florida Bar v. Furman*, 376 So.2d 378, 382 (Fla. 1979) (Furman I), in addition to directly ruling on the *Furman* case, the Supreme Court directed "The Florida Bar to begin immediately a study to determine better ways and means of providing legal services to the indigent." The Court's direction produced "The Legal Needs of the Poor and

Underrepresented Citizens of Florida: An Overview", that was prepared by the Center for Governmental Responsibility, Holland Law Center, University of Florida. The report was submitted to The Florida Bar on January 10, 1980. It included a section on "Paralegals: Legal Assistance by NonLawyers" that noted, among other things, "the limited paralegal practices under the *Furman* decision."

As reported in 450 So.2d 810 (Fla. 1983), The Florida Supreme Court, on December 8, 1983, granted The Florida Bar's June, 1982 petition to amend Florida Rule of Civil Procedure 1.611 "to provide a simplified procedure by which dissolution of a marriage of short duration can be obtained by the parties without their having to employ private counsel."

By an order of May 3, 1984, The Florida Supreme Court then put into effect the simplified marriage dissolution procedure. The parties to the dissolution of marriage proceeding may file with the clerk of circuit court, a petition for simplified dissolution of marriage. However, the parties are required to certify that no children were born to, or adopted by, the parties; and that the parties have made provision for the division of their property.

The Florida Bar, in 1982, created a Long-range Planning Committee. It reported in 1984, and its recommendations included the Bar's commitment to simplified legal documents and court forms.

A Commission on Access to the Legal System, composed of 16 members, was appointed by the Governor of Florida, the Chief Justice of The Florida Supreme Court, and the President of The Florida Bar. The purpose of the Commission was to explore various

alternatives "which would increase access to the legal system on the part of the poor and middle class." Its report of June, 1985, in a section on "Legal Services to the Poor," declared

> We see only two solutions which can provide any real relief to this need: (l) Money to hire lawyers to represent the poor; (2) Time devoted by private lawyers to representation of those who cannot pay. Other solutions, such as simplification of procedures so people can represent themselves can provide some relief but cannot come close to addressing the need.

In the view of the Commission, "adoption of standards for public service for lawyers within the state and modification of the Interest on Trust Account Program to require participation by all lawyers are essential to any meaningful solution to the legal needs of the poor."

As a result of these two reports, the Board of Governors established a Board Committee on Access to the Legal System in 1985.

It is evident that The Florida Bar and The Florida Supreme Court have taken positive steps to increase and improve the delivery of legal services to the poor. This has been particularly true in the field of matrimonial law. However, in the context of the prevailing party issue, it is not enough to assume that The Supreme Court's July 9, 1987 revision of the Unlicensed Practice of Law Rule directly evolved from the above catalogued actions of The Florida Bar and The Supreme Court. As *Martin v. Heckler*, 773 F.2d 1145, 1151 (llth Cir. 1985), has observed "it often appears that time would eventually cure the problem." Rather, proof is needed that would

directly link the foregoing actions of The Florida Bar to the revision of The Supreme Court's Unlicensed Practice of Law Rule. That proof is lacking. Additional events, which this court finds more relevant, are developed in the record.

In Serena Dunn's memorandum of May 5, 1983, she stated

> She simply seeks an order prohibiting the defendants from enforcing the portion of the unauthorized practice rules that prevents oral communications between lay persons and clients, such as plaintiff Dunn and those similarly situated, i.e., others in need of assistance in obtaining a divorce or in exercising other fundamental rights, such as adoption or a name change, for which the state maintains a monopoly, and who cannot afford a lawyer and who cannot use lay assistants because they cannot complete the required forms.

Thus, soon after she filed her complaint, plaintiff Dunn directly asked as relief, total cessation of the prohibition against "oral communication between lay persons and clients."

At the oral hearing of December 2, 1985, on defendants' summary judgment motions, Judge Melton engaged in colloquy with counsel. In much lesser scope than the unlimited permission for lay assistants to engage in oral conversations with customers in filling out divorce papers, sought by the plaintiff on May 5, 1983, Judge Melton, in the following colloquy, suggested that a lay assistant should be allowed to engage in the following type of oral conversation with a customer:

> I can't see anything wrong with [a lay assistant] telling [clients], You've got the wrong answer there. It's not the right answer to that question You just go back and fill them in.
>
> As I understand The Florida Bar's position now is that you can't do that. You can't tell them that — the example I gave you, he was married on March 15th, 19[8]2. The lay assistant writes down March 15th, 1992. And then he finishes it up and that's it. Then he or she pays the lay assistant whatever it is and they go on their way. Take it down to the judge and the judge is going to say, Well we haven't even reached the date you were married yet.
>
> That's the problem it looks like to me that's in this whole case. It looks a lot simpler to me than it is to you gentlemen. I can tell that.

Later the court said

> Now it seems to me though this: That assuming — let's get away from the constitutional ground just a moment. And let's just talk about what's right and what's wrong. It's a problem that I recognize because I've got several volumes here of it already. You have spent a lot of time....
>
> Therefore, if we have a problem and The Florida Bar and the Supreme Court and these parties can solve the problem for these people, even though maybe they have — let's assume for the sake of what we're talking about now that they really have no right to it,

that there's no constitutional right and really they shouldn't — maybe nothing could be done about it unless somebody does. What's wrong with correcting a wrong just for the sake of doing something that would be in the best interests of everyone?

Mr. Taylor: From my personal standpoint, not a thing.

In an order of November 10, 1986, Judge Melton denied defendants' motions for summary judgment. It is discussed more fully *supra*, at pp. 19-22. The Florida Bar reports that in the same month, "November, 1986 [the Unlicensed Practice of Law/Access Joint Committee] met jointly with the Board of Governors' Committee on Access to the Legal System and recommended that the latter study and take action regarding access to the courts." Later, on February 18, 1987, Mr. Dittmar, The Florida Bar's counsel, revealed that Judge Melton's views were reported to The Florida Bar Committees. Undoubtedly, minutes of those Committee meetings, had they been produced in this proceeding, would have shown that. Moreover, the affidavit of Steven J. Uhlfelder, Chairman of The Florida Bar's Access to the Legal System Committee, is not to the contrary.[9]

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[9] Steven J. Uhlfelder, Chairman of The Florida Bar's Access to the Legal System Committee, states, in an affidavit, that the Committee "has met regularly and coordinates its activities closely with the Delivery of Legal Services Committee." Without further detail, Mr. Uhlfelder states

> In continuation of the Bar's interest in simplifying and streamlining procedures to simple dissolutions of marriage and other legal procedures, the Board and the Access Committee has considered ways to make it easier for citizens to complete these procedures. One of the

continued

At the status conference of February 18, 1987, Judge Melton was advised of Bar committee activities. Judge Melton asked Harris Dittmar, counsel for The Florida Bar

> Have there been any further efforts in settlement of this case...because I talked with you about things that I express some concern [ ] with before. I'm not going into those again...

Mr. Dittmar responded

> Your Honor, I am pleased to report to you that the problem of access to the courts in all areas, and particularly in the area of dissolution of marriages, has been addressed over the last five or six years and is continuing to be addressed actively by committees of The Florida Bar
>
> I think Your Honor is certainly entitled to know what's going on, and we plan to make a full showing of it. And hopefully it will impress not only Your Honor but Mr. Morrison, the things that are going on. I'm really not kept in day to day contact with them. I'm

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proposals which the Committee approved and the Board adopted is a change to the Unauthorized Practice of Law Rules which would allow nonlawyers to engage in limited oral communications to assist individuals in the preparation of legal forms approved by the Supreme Court and inform the individuals on how to file such forms.

Also, Michael Tartaglia, The Florida Bar's Director, Public Interest Programs, states that in January, 1987, he met with UPL counsel Mary Ellen Bateman about a proposal to allow lay persons to assist individuals with completing dissolution of marriage forms and filings.

> no longer in the Board of Governors or the leadership of the Bar, nor am I active on any of the committees that are addressing these. So I can't tell you firsthand. But I just don't see anything to be gained by that sort of [settlement] session.
>
> But the problems that Your Honor mentions specifically were all communicated to the leadership of the Bar and have been sent to the appropriate commitees. And I know for a fact that each of them is trying to find some way to address them.

A month later, on March 20, 1987, The Florida Bar Board of Governors approved the proposed amendment to The Supreme Court's Unlicensed Practice of Law Rule, *supra* at p. 7. This had been drafted by the Committee on Access to the Legal System.

The content, as well as the juxtaposition, of the foregoing relevant events convince this court, and it is concluded, that the prosecution of the *Dunn* case was "a substantial factor or a significant catalyst in motivating" defendant The Florida Bar to propose to The Florida Supreme Court the revised Unlicensed Practice of Law Rule. A clear causal connection between the prosecution of the *Dunn* case and The Florida Bar's proposed revised Unlicensed Practice of Law Rule has been established.

This is nonetheless true because the proposed revision represented a further effort on the part of The Florida Bar to increase and improve the delivery of legal services to the poor in the State of Florida. Nor is the causative connection diminished because Judge Melton's expression of views at the *Dunn* hearings of December 2, 1985 and February 18, 1987, undoubtedly stimulated The

Florida Bar in accomplishing the proposed revision. Judge Melton's remarks were relevant to the hearing's consideration of the claimed constitutional issue; and since the remarks led to the Rule revision and the voluntary dismissal of the case, the case formed the catalyst and a strong link in the causal connection. Moreover, a voluntary dismissal falls within *Maher v. Gagne*'s range of disposition that may invoke section 1988.

Since The Supreme Court revised the Unlicensed Practice -of Law Rule, in accordance with the revised rule proposed by The Florida Bar, it follows that the prosecution of the *Dunn* case is also causally related to The Supreme Court's adoption of the revised rule. Moreover, The Supreme Court's incorporation of the wording changes suggested by plaintiffs' counsel, even though not done in the course of the *Dunn* case, does not break the chain of causation.

Therefore, if the plaintiffs had established their threshold constitutional entitlement under section 1983, to seek attorneys' fees under section 1988, plaintiffs would be found to be the prevailing party under section 1988.

III.

B.

Subject to the condition previously stated, the court proceeds to calculate a "reasonable attorney's fee" which may be "allow[ed] the prevailing party" under section 1988. *Norman v. Housing Authority*, 836 F.2d 1292, 1299 (11th Cir. 1988), observes that

> The Supreme Court elected the lodestar approach because it produces a more objective estimate and ought to be a better assurance of more even results.

Further

> Under *Hensley [v. Eckerhart*, 461 U.S. 424, 433 (1983)] the starting point in any determination for an objective estimate of the value of a lawyer's services is to multiply hours reasonably expended by a reasonable hourly rate, 461 U.S. at 433.

Attention is first turned to fixing a reasonable hourly rate, the major area of dispute. Mr. Morrison seeks an hourly rate of $215. He asserts that this is a reasonable rate in federal complex litigation in the Washington, D.C. area in which he practices. Defendant The Florida Bar, on the other hand, takes the position that while "the hourly rates for Mr. Morrison and his associate may be appropriate for the District of Columbia, they are higher than those found in local practice, and a reduction in the hourly rates may be appropriate. *Donaldson v. O'Connor*, 454 F. Supp. 311, 314-15 (N.D.Fla. 1978)." The *Donaldson* court recognized that "as a general matter, the fees customarily charged in the community where the lawsuit is prosecuted will govern the amount of fees to be awarded under section 1988." *Donaldson* thereupon held that "where, as here, a plaintiff can show he has been unable through diligent, good faith efforts to obtain local counsel, attorney's fees under 42 U.S.C. § 1988 are not limited to the prevailing rate in the district where the

case is tried."[10] Under *Donaldson*, it becomes a factual question whether a civil rights attorney of sufficient experience and capability was available in the Jacksonville legal community.

In its memorandum of January 15, 1988, defendant The Florida Bar states

> Defendants recognize Mr. Morrison's abilities and his familiarity with the issues presented in this case; nevertheless, plaintiffs employment of William Sheppard, an eminently qualified civil rights attorney, as local counsel demonstrates that there was qualified local counsel available to litigate plaintiffs' claim.

However, in his affidavit of February 26, 1988, William Sheppard states under oath

> I hereby unequivocally state that I would not have undertaken the primary representation of the plaintiff class in this case. I am uncertain as to whether I have the necessary resources to undertake a matter of this magnitude.

Augmenting this affidavit, Mr. Sheppard testified on March 24, 1988 that in 1983 he was appointed by the late Judge Scott of the Jacksonville Division of the Middle

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[10] Usually the reasonable hourly rate is that prevailing in the community for similar work. *See Copeland v. Marshall* 641 F.2d 880, 892 (D.C. Cir. 1980), and *Donnell v. United States* , 682 F.2d 240, 251 (D.C. Cir. 1982). *Donnell* at 252 n.33 recognizes *Chrapliwy v. Uniroyal, Inc.* , 670 F.2d 760, 768 (7th Cir. 1982), and *Donaldson v. O'Connor*

District "to assume the responsibility of representing the inmates who are incarcerated now in 35 major prisons, in Florida and probably 100 minor prisons." The class consists of 34,000 people. He states that he has been "consistently and regularly, on a daily basis, involved in representing the members of that class since my appointment." Other testimony of Mr. Shepperd indicates that there is no other Jacksonville attorney, specializing in civil rights matters, that has the experience or the capability to initiate or prosecute either the *Dunn* case, or a case of similar magnitude.[11]

Earlier, this court quoted Mr. Morrison concerning the "core theory" that has been the basis of the *Dunn* case. He developed this theory during his representation of Rosemary Furman. Thus, it is clear that the *Dunn* case is the unique brainchild of Mr. Morrison. This court is convinced that there is no other counsel in the Jacksonville area that could have undertaken or would have prosecuted the *Dunn* case.

Mr. Joe Sims, a Washington trial attorney with Jones, Day, Reavis and Pogue, testified that "in complex civil litigation, federal court civil litigation, the hourly rate for lawyers in Washington, D.C. would range anywhere from

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[11] Defendant The Florida Bar notes that the "Middle District of Florida extends to the Orlando and Tampa areas, and plaintiffs presented nothing to indicate there were not experienced civil rights attorneys in those locales who could have handled this case at the prevailing market rates in the Middle District of Florida." But then, in the next sentence, defendant The Florida Bar says that Mr. Morrison should be compensated "at the prevailing local rates." It is evident he is referring to Jacksonville Division's hourly rates. The court determines this is the local community and plaintiffs need only show the absence of an available and qualified civil rights lawyer in the Jacksonville Division.

$150 to $175 at the very lowest end of that range, probably to about $350, or $400 at the very highest end of that range." Mr. Harris Dittmar, counsel for the defendant The Florida Bar and whose office is in Jacksonville, testified that his usual hourly rate is $200, and that he personally knows of no one who charges as much as he does in Jacksonville.

Considering the applicable law and the evidence in the record, the court determines that a reasonable hourly rate for Mr. Alan Morrison's services is $200. The top of the Jacksonville line (Dittmar) hourly rate of $200 is not an out-of-line hourly rate for Washington based Morrison. He was able to identify only one case in which he has been awarded fees, calculated on an hourly rate, as high as $215 an hour. Two hundred dollars represents a 7-1/2% reduction from Mr. Morrison's requested hourly rate. Each of the other plaintiffs' attorneys' hourly rates, requested by the plaintiffs, shall be reduced by the same 7-1/2%, rounded off to the nearest five dollars.

As a related subject, it is further determined that since Mr. Morrison resides in Washington, it is appropriate and reasonable to reimburse Mr. Morrison for his reasonable roundtrip travel expenses between Washington, D.C. and Jacksonville, Florida.

Since Mr. Sheppard is shown to be a qualified civil rights attorney, defendant The Florida Bar argues that Mr. Morrison is not entitled to travel time expenses, *citing Johnson v. University College of the Univ. of Alabama in Birmingham*, 706 F.2d 1205, 1208 (llth Cir. 1983), *cert. denied*, 464 U.S. 994 (1983). On the point relevant to the present question, that case declared "since plaintiffs had the right to retain more than one attorney, the exclusion of out-of-town counsel's travel

time is proper only if it was unreasonable not to hire qualified local counsel." But, Mr. Sheppard testified that when he got into this case he told Mr. Morrison, "If our firm does this Ms. White is going to have to be the lead, because I simply don't have the time because of my responsibility to these inmates." Although Ms. White is qualified to serve as local counsel to Mr. Morrison, her three years at the bar at the time *Dunn* was filed did not qualify her to act as principal attorney. Therefore, *Johnson* is not apposite.

III.
B.

Only one major question has been raised by the defendant The Florida Bar as to the number of hours which Mr. Morrison records as being expended

> Mr. Morrison testified that he included in his fee application up to 15 hours of time attributable to his participation in the rule making process before The Florida Supreme Court (Tr. 53-54). This time should, of course, be deleted from the fee request.

While these hours were beneficial to the class he represented, it is correct that the time was spent in preparing his written comments to the Supreme Court of Florida, which suggested some word changes in The Florida Bar's proposed revised Unlicensed Practice of Law Rule. Since the hours were not officially incurred in the *Dunn* case, it is held that these hours should be deducted from Mr. Morrison's total hours.

III.
C.

In his affidavit, Mr. Morrison asserts at paragraph 22

> I also wish to make one other observation about this litigation. The theory had never been attempted by any lawyer in any case of which I am aware. It was entirely novel and faced substantial legal barriers to success....

Mr. Morrison's affidavit stated that the "theory" was "entirely novel and faced substantial legal barriers to success." It is for this reason that this court has approved an hourly rate of $200, where, except for the allowance of $215 in one case, the next highest rates awarded to him were fixed at $150 to $175 an hour. *Pennsylvania v. Delaware Valley Citizens Council*, 106 S.Ct. 3088, 3098 (1986) (Delaware Valley Citizens Council I), notes

> ...[W]e specifically held in *Blum* [v. Stenson, 465 U.S. 886, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984)], that the "novelty [and] complexity of the issues," "the special skill and experience of counsel," the "quality of representation," and the "results obtained" from the litigation are presumably fully reflected in the lodestar amount, and thus cannot serve as independent bases for increasing the basic fee award. *Id.* at 898-900, 104 S.Ct. at 1548-1550.

Norman v. The Housing Authority, 836 F.2d 1292, 1302 (1988) directs the district court to "determine whether

the fee arrangement was contingent," *citing Pennsylvania v. Delaware Valley Citizens Council*, 107 S.Ct. 3078 (1987) (Delaware Valley Citizens Council II). There, the Supreme Court concluded

> Before adjusting for risk assumption, there should be evidence in the record, and the trial court should so find, that without risk-enhancement plaintiff would have faced substantial difficulties in finding counsel in the local or other relevant market. Here there were no findings.

Id. at 3089.

Mr. Morrison further states in his affidavit

> In my view, if our office had not agreed to undertake this lawsuit, it would not have been undertaken at all.

This statement is consistent with this court's earlier finding that the "core theory" of this case was the "brainchild" of Mr. Morrison. Nevertheless, Mr. Morrison has not stated, and the plaintiffs have not offered other evidence that "without risk-enhancement plaintiff would have faced substantial difficulties" in getting Mr. Morrison to file and prosecute the *Dunn* case. He has made it clear that he had the "core theory" before he had Serena Dunn as a client. Hence, applying the rule of *Delaware Valley Citizens Council II*, the record does not permit the court to grant plaintiffs' request for fee enhancement.

III.
D.

Hensley v. Eckerhart, 461 U.S. 424, 440 (1983), holds "that the extent of a plaintiff's success is a crucial factor in determining the proper amount of an award of attorney's fees under 42 U.S.C. § 1988" and "where the plaintiff achieved only limited success, the district court should award only that amount of fees that is reasonable in relation to the results obtained."

In the Third Amended Complaint, the plaintiffs asked the court to issue an order "declaring that the Florida rules precluding lay assistants from aiding plaintiffs and the other members of the plaintiff class in obtaining dissolutions of their marriages violate plaintiffs' rights under the equal protection and due process clauses..." and "enjoining the defendants from enforcing restrictions on lay assistants aiding plaintiffs...in exercising their rights to obtain a dissolution of marriage."

In their memorandum of October 26, 1987, they contend

> [p]laintiffs had prayed for an injunction against the continued enforcement of the Rules on unauthorized practice of law, and the defendants, in effect, gave them that result by changing the Rules to remove the objectionable features.

During Mr. Morrison's March 24, 1988 testimony, and in the post-hearing memoranda, it has become evident that the parties are in vigorous dispute over the extent of relief, sought by the plaintiffs, which has been achieved

by the Rule change. Thus, Mr. Morrison was cross-examined

Q. Mr. Morrison, doesn't the rule permit limited oral communication?

A. Yes.

Q. But that communication is limited, is that correct?

A. There are some limitations on it, yes.

Q. So, it, in fact is restricted to eliciting factual information?

A. Correct.

Q In other words, if she wanted alimony, she —a lay assistant could not type in that request under [Rule] 1.943(a)?

A. I do not believe that's necessarily so.

Q. Well, then, where is the provision that allows a lay assistant to type that kind of information or request?

A. ....In my opinion, there would be nothing that would prohibit someone from doing precisely that if the question was, all they asked for was in the wherefore clause, to add a petition, to add a request for alimony visitation rights, or something along that line.

Continuing Mr. Taylor's cross-exarnination

Q. Wouldn't that be—wouldn't then the lay assistant be drafting paragraphs in that document and asking for certain legal relief from the court?

A. In my opinion, that would be authorized by the rule, and I certainly hope the Florida Supreme Court did not intend to be parsimonious in the relief that it granted that they would make that unauthorized.

Indeed, if I had believed that that was not authorized, I would not have dropped the case.

Q. Well, isn't the clear words of the rule, in the amendment to the UPL rule, state that the oral communications is restricted to those communications to elicit factual information necessary for the filling out of forms?

A. To complete the forms, yes, that what it says.

Q. So, in other words, getting factual information on child support, alimony, and putting them on a blank piece of paper where there is no fill in the blanks, is not legal drafting?

A. I don't know whether it's legal drafting or not. All I know is that, in my opinion, that would be authorized by the rule, period.

Finally

> Q. If I understand your testimony correctly, Mr. Morrison, is that the taking of factual information means more than just filling in blanks, on a form, that have been provided by the Supreme Court?
>
> A. It would largely include that, but that there are certain additional matters directly related to the matters covered by the form that, in my opinion, could properly have been done by the lay assistants, under the revised rule, in the spirit in which it was given.

In the plaintiffs' post-hearing memorandum, plaintiffs' counsel supplements his testimony

> Moreover, as Mr. Morrison explained, id., [TR 98-104] he sees that nothing in the Rule or in the forms that precludes paralegals from providing supplemental information in response to direct factual questions necessary to complete the forms for the particular client.

Defendant The Supreme Court directs the second half of its post-hearing memorandum to "Plaintiffs' erroneous perception of the change in the Florida Rules of Court and the misperception of what forms can be utilized by lay assistants." This takes seven pages. These excerpts are particularly pertinent.

> ....[I]t was established in the hearing of this case that the Plaintiff class would not, because of its

restrictions, be able to use the simplified procedures set out in Rule 1.611(c) and, thus, unable to use Forms 1.943(b) through 1.943(e), created and approved by the Supreme Court. Then in his testimony, Mr. Morrison, in particular, claimed that under the change to Rule 10-1.1(b), a lay assistant can take any form, such as Form 1.943(a), Florida Rules of Civil Procedure, and fill out the form for one of the Plaintiff class allowing that person to obtain a divorce. (T: 93-994 and 98-103). Recided in full, including the notes, form 1.943(as) states:

PETITION FOR DISOLUTION [sic]
OF MARRIAGE

The petition of A.B. shows:

1. This is an action for dissolution of the marriage between petitioner and respondent, C.D.

2. Petitioner has been a resident of Florida for more than six months next before the filing of the petition.

3. Petitioner and respondent were married to each other on _____, 19 ____ at (place of marriage).

4. The marriage between the parties is irretrievably broken.

WHEREFORE petitioner demands a judgment dissolving the marriage.

NOTE: Allegations about joint property, alimony, custody, attorney's fees and temporary relief are ommited [sic] from this form *and must be added when proper*. Verified allegations or an affidavit must be used when child custody is an issue. *See*, § 61.132, Florida Statutes (1979). (emphasis supplied)

One can see from the Form and the accompanying note that allegations concerning property, alimony, child support, custody, visitation, temporary relief and attorneys' fees are "omitted from this form and must be added where proper." This form is *not* a legally complete form. Who does Mr. Morrison intend to add those missing items; the lay assistant! Yet by the very definition, the adding of any allegations to this Form would not only require the collection of factual information but would require the interpetation [sic] of the raw data and the application of the collected facts to the statutes and case law in deciding what is to be alleged and relief requested. This is clearly the giving of advice. *Florida Bar v. Mills*, [398 So.2d 1186 (Fla. 1978)] *See also*, *The Florida Bar v. American Legal & Business Forms, Inc.*, 274 So.2d 225 (Fla. 1973). In addition, the selection of this Form and its completion to achieve the legal rights sought by the Plaintiff class member is legal drafting. *See*, *In re Florida Bar*, *supra* (layman making changes in legal forms to fit the specific factual needs of another is practice of law). *But*, is this the only form a person in a contested divorce or a divorce with children needs to file with the trial court? Who is to make that determination? Who is to select the approriate [sic]

type of form to meet the need of the client? Who is to draft the form? The lay assistant?

With the understanding of what is advice and drafting, the intent and purpose of the change to Rule 10-1.1(b) is quite clear. The new Rule permits lay assistants to elicit *factual* information to complete those forms created and approved by the Supreme Court that are legally complete "fill in the blank" type forms, not the wholesale completion of skeletal forms approved by the Supreme Court in a book intended for use by the members of the Florida Bar. What the Bar and Supreme Court did in changing its rules was to provide all the tools necessary to the lay assistant for the completion of the forms without giving the lay assistant to [sic] opportunity to engage in the "practice of law."

....

Mr. Morrison's interpretation is even more preposterous when one compares his testimony and its implications to the simplified dissolution rule. That rule, Rule 1.611(C), Florida Rules of Civil Procedure, permits those couples without children, and where there is no contest to the divorce, to use the simplified, fill in the blank, forms (Forms 1.943(b) - 1.943(e)) to get a divorce. (footnote omitted) Applying Mr. Morrison's position, members of the Plaintiff class, while not qualifying for the simplified procedures or being able to use the Supreme Court created and approved fill-in-the-blank forms, would be able to go to a lay assistant, provide the lay

> assistant factual information concerning their contested divorce or a dispute over the children and have the lay assistant interpet [sic] the factual information, decide what couse [sic] of legal action was appropriate for that person, select the appropriate forms and draft all the allegations and relief requested for the forms from scratch. It is beyond comprehension that the Florida Bar and Florida Supreme Court, in restricting the class of people who can use the simplified procedures and its prepared, simplified forms, would grant sweeping authority in the unlicensed lay assistants in dealing with that class of persons not eligible for the simplified procedures because of the complexity of their issues.
>
> ....
>
> In sum, the Plaintiff class can *not* obtain a divorce through a lay assistant using any form presently in existence.

Of course, it is The Florida Supreme Court, and not this court, which has the power and jurisdiction to authoritatively construe and apply its revised Unlicensed Practice of Law Rule of July 9, 1988. However, it is this court which now needs to make a judgment concerning the meaning and extent of the revision to the Rule in order to pass on the *Hensley v. Ekerhart* issue of the "extent of [plaintiffs'] success."

This court has earlier determined that the Rule revision prosecution of the *Dunn* case and Judge Melton's remarks at the oral hearing of December 2, 1985 was a

"substantial factor, or a significant catalyst in motivating" The Florida Bar to seek the Rule revision. The court determines that those remarks, while not providing the precise boundaries of the revised Rule, at least provide a context which should guide this court in construing the revised Rule and in measuring the results the plaintiffs achieved through the Rule revision. The court has noted that Judge Melton's suggested revision did not go as far as plaintiffs asked for on May 5, 1983, namely an "order prohibiting the defendants from enforcing the portion of the unauthorized practice rules that prevents oral communications between lay persons and clients."

In addition, this court concludes that defendant The Supreme Court's statements, quoted *supra* at pp. 49-52, represent a reasonable construction of the meaning and scope of the revised Rule. Plaintiffs' reading of the revised Rule is too expansive. Combining all of these elements, it is concluded that the plaintiffs have achieved 50% of the relief which plaintiffs sought in their Third Amended Complaint.

Accordingly, it is determined that, were the plaintiffs to have prevailed on the threshold entitlement issue, the court would award as reasonable attorneys' fees one-half of the net fees previously calculated. However, plaintiffs are awarded all of their expenses without a reduction.

IT IS SO ORDERED.

/s/ William K. Thomas
UNITED STATES DISTRICT SENIOR JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

SERENA DUNN, et al.,
Plaintiffs,
vs. Case No. 83-243-Civ-J-M
THE FLORIDA BAR, et al.,
Defendants.

ORDER

This cause is before the Court on motion to dismiss the amended complaint by defendants The Florida Bar and James C. Rinaman, Jr., as President of The Florida Bar, filed herein on June 14, 1983. Plaintiff Serena Dunn's memorandum in opposition to said motion was filed herein on June 29, 1983. The Court held a hearing on said motion on December 19, 1983.

Upon consideration of the memoranda and oral arguments in support of and in opposition to said motion, the Court is of the opinion that the motion to dismiss should be denied. Accordingly, it is

ADJUDGED:

1. That the motion to dismiss filed by defendants The Florida Bar and James C. Rinaman, Jr., as President of The Florida Bar, is hereby denied;

2. That defendants The Florida Bar and William O. E. Henry, as President of The Florida, (automatically substituted for James C. Rinaman, Jr., as President of The Florida Bar, pursuant to Fed. R. Civ. P. 25) shall file an answer to the amended complaint by January 30, 1984;

3. That defendants' memoranda in opposition to plaintiff Serena Dunn's motion for class certification shall be filed by January 30, 1984, if said motion is opposed; and

4. That plaintiff Serena Dunn shall have until February 10, 1984, to file a reply to defendants' memoranda in opposition to plaintiff Serena Dunn's motion for class certification.

DONE AND ORDERED in Chambers at Jacksonville, Florida, this 5th day of January, 1984.

/s/ Howell W. Melton
UNITED STATES DISTRICT JUDGE

Copies to:
Counsel of Record

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

SERENA DUNN, etc., et al.,
Plaintiffs,
vs. Case No. 83-243-Civ-J-12
THE FLORIDA BAR, et al.,
Defendants.

ORDER

This cause is before the Court on motions for summary judgment submitted by The Florida Bar and The Florida Supreme Court. Said motions were filed on September 27, 1985, and October 2, 1985, respectively, and plaintiffs' consolidated response to these motions was filed on October 18, 1985. The Court has heard argument of counsel and has considered at length the matters raised in the motions. Being thus well-advised in the premises, the Court has determined that both of the pending motions for summary judgment should be denied. A discussion of the Court's ruling follows below.

I. The Florida Bar's Motion for Summary Judgment

The Florida Bar raises a single issue in its motion for summary judgment, arguing simply that the disposition of this case is controlled by the United States Supreme Court's summary dismissal of the appeal in *Furman v. The Florida Bar*, 444 U.S. 1061 (1980). In making this argument, the Bar contends that the constitutional issue

which was presented in *Furman* is identical to that raised in this case. Because the *Furman* appeal was dismissed for want of a substantial federal question and, because such a dismissal constitutes an adjudication on the merits under *Hicks v. Miranda*, 422 U.S. 332 (1975), the Bar argues that binding precedent now controls the resolution of the issue raised in this case. That is, the Bar contends that judgment should be entered in its behalf because the United States Supreme Court has previously determined that claims such as those raised by plaintiffs are insubstantial.

The precedential scope of the Supreme Court's summary decisions is a complex matter and thus this Court is fortunate that the Eleventh Circuit has recently visited this question. In *Hardwick v. Bowers*, 760 F.2d 1202 (11th Cir. 1985), *reversed on other grounds*, 106 S.Ct. 2841 (1986), the court announced that the "ultimate question" in determining the precedential scope of a summary disposition is an inquiry directed at the "most narrow plausible rationale for the summary decision." 760 F.2d at 1208. The application of this principle in *Hardwick* resulted in a finding that a summary affirmance did not create binding precedent as to the constitutional issues raised in the jurisdictional statement because a more narrow ground existed for the summary affirmance: lack of standing. In reaching this decision, the Court in *Hardwick* issued the following directive:

> Lower courts may rely upon the jurisdictional statement as an outside limit on the precential [sic] scope of a summary decision but Supreme Court precedent does not allow us to consider the jurisdictional statement as both a minimum and a

> maximum formulation of the issues decided. Where . . . the facts of the case plainly reveal a basis for the lower court's decision more narrow than the issues listed in the jurisdictional statement, a lower court should presume that the Supreme Court decided the case on that narrow ground.

Id.

With these principles firmly in mind, this Court has reviewed the summary dismissal in *Furman* and concluded that it has no precedential impact on the constitutional question raised *sub judice*. The constitutional issue raised in *Furman* is set forth in appellant's jurisdictional statement as follows: "[w]hether a state may constitutionally apply its otherwise valid rules prohibiting the unauthorized practice of law to preclude indigents from utilizing lay services that are essential to exercise the fundamental right to obtain a divorce." Appellant's Jurisdictional Statement at 1, *Furman v. The Florida Bar*, 444 U.S. 1061 (1980). While the same constitutional argument is made in the present case, the context in which it is raised is much different because of the factual dissimilarity of the two cases. It is an examination of precisely this difference which reveals an alternative basis for the Supreme Court's dismissal in *Furman*, one which would not require an adjudication of the merits of the constitutional issue. This alternative is simply that the appellant lacked standing to raise the rights of indigents as a defense in an action brought against her by the state.

Two factors support the hypothesis that the constitutional claim in *Furman* was dismissed based on the appellant's lack of standing. First, only a portion of appellant's clientele were indigent and thus her constitutional claim was only a partial defense to the charges against her. Second, the Supreme Court has recognized on a number of occasions that, while the rights of two parties involved in a transaction may be complementary, a court may acknowledge the rights of one party while denying those of another. *See Leis v. Flynt*, 439 U.S. 438, 442 n.4 (1979); *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 755-57 (1976); *Kleindienst v. Mandel*, 408 U.S. 753 762-65 (1972). In light of these factors, it would appear highly plausible that the *Furman* appeal was dismissed on the basis of standing, rather than on any substantive ground. Accordingly, this Court finds that the *Furman* dismissal has no precedential impact herein and hence The Florida Bar's motion for summary judgment will be denied.

II. The Florida Supreme Court's Motion for Summary Judgment

In moving for summary judgment, The Florida Supreme Court has raised the following five arguments: 1) that plaintiffs have not been denied due process or equal protection; 2) that there is no constitutional right to a divorce; 3) that there is no right to counsel in a divorce court; 4) that states possess a legitimate and substantial interest in the regulation of the legal profession; and 5) that Florida has a compelling state interest in retaining and enforcing its unauthorized practice of law rules. As can be discerned from the general nature of these

arguments and from the fact that The Florida Supreme Court has presented no supporting affidavits attacking the factual predicate of plaintiffs' claim, this motion for summary judgment is tantamount to a motion to dismiss for failure to state a claim upon which relief can be granted, and the Court will analyze the motion accordingly.

To begin with, the Court would note that arguments similar to those raised in the instant motion were raised by The Florida Bar in its motions to dismiss. In an order entered on January 5, 1984, the Court denied the Bar's motion to dismiss the amended complaint and in so doing, the Court implicitly rejected these contentions. The status of the pertinent law has not changed appreciably since that date and the Court thus sees no reason to revisit its previous ruling.

Even if the Court were not bound by its earlier ruling on these arguments, it would nonetheless deny The Florida Supreme Court's motion. As mentioned in section one of this Order, the issue presented in this case is the constitutionality of Florida's laws precluding lay assistants from aiding members of the plaintiff class in obtaining dissolution of their marriages. In addressing this constitutional question, the Court faces at least one major factual question: whether the members of the plaintiff class have actually been denied access to the courts based on a state-created barrier. Because this question requires an examination of the practical results of the challenged regulations, and because the access issue will in this case be a question of degree, the Court is of the opinion that this case cannot be decided until after the presentation of evidence. The Florida Supreme Court's motion for summary judgment will therefore be

denied and this case shall be set for trial. Accordingly, it is

ADJUDGED:

1. That The Florida Bar's motion for summary judgment is hereby denied; and

2. That The Florida Supreme Court's motion for summary judgment is hereby denied.

DONE AND ORDERED in Chambers at Jacksonville, Florida, this 7th day of November 1986.

/s/ Howell W. Melton
UNITED STATES DISTRICT JUDGE

Copies to:
Counsel of Record

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed Feb 5, 1990]

NO. 88-3865

SERENA DUNN, individually and WILLIE A. WIGGS, and MARVA PAMELA EVANS, individually and on behalf of similarly situated individuals, Plaintiffs-Appellants, Cross-Appellees,

versus

THE FLORIDA BAR, THE SUPREME COURT OF FLORIDA, GERLAD F. RICHMAN, President of the Florida Bar, et al, Defendants-Appellees, Cross-Appellants.

Appeal from the United States District Court for the

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING IN BANC

(Opinion December 6, 1989, 11 Cir. 198_, ___ F.2d ___).

Before: KRAVITCH, Circuit Judge, HILL*, Senior Circuit Judge and FREEMAN**, District Judge.

PER CURIAM:

(XX) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules Or Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause in banc, and a majority of the judges in active service not having voted in favor of it, Rehearing In Banc is DENIED.

ENTERED FOR THE COURT:

/s/ PHYLLIS A. KRAVITCH
United States Circuit Judge

*See Rule 34-2(b), Rules of the U.S. Court of Appeals ORD-42 for the Eleventh Circuit.

** Honorable Richard C. Freeman, U.S. District Judge for the Northern District of Georgia, sitting by designation.

(2)

Supreme Court, U.S.
FILED
JUN 29 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1691

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

SERENA DUNN, at al.,

Petitioners,

v.

THE FLORIDA BAR,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

ROBERT A. BUTTERWORTH
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The Supreme Court of Florida

QUESTION PRESENTED

Was the application of the second prong of the Nadeau v. Helgemoe, 581 F.2d 275 (1st Cir. 1978), test, used for determining whether the defendant's conduct was "not required by law," by the trial court proper in this case where there was no judicial determination on the merits of the plaintiffs' claim at the time the plaintiffs voluntarily decided to terminate the litigation and there existed the assertion by the defendants that there was no constitutional or statutory right underlying the plaintiffs' claim?

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STATEMENT OF THE CASE

As pointed out by the Eleventh Circuit Court of Appeals in its opinion, "[t]his case began life in another form." Dunn v. The Florida Bar, 889 F.2d 1010, 1011 (11th Cir. 1989). This case is a continuation of the so far never ending battle between Ms. Rosemary Furman, and other nonlawyers, who desire to conduct commercial, for profit enterprises providing legal services to the public. Florida's history with this issue can be found in such cases as The Florida Bar v. Furman, 451 So.2d 808 (Fla. 1984); The Florida Bar v. Furman, 376 So.2d 378 (Fla. 1979); The Florida Bar v. Brumbaugh, 355 So.2d 1186 (Fla. 1978); and The Florida Bar v. American Legal and Business Forms, Inc.,

274 So.2d 225 (Fla. 1973). These cases concerned the extent nonlicensed individuals could operate without violating Florida's unlicensed practice of law (UPL) rules in the conduct of their commercial businesses.

During the last prosecution of Ms. Furman by the Florida Bar, one of Ms. Furman's reputed "clients", Serena Dunn, filed a class action against the Florida Bar and the Supreme Court of Florida in the United States District Court for the Middle District Court of Florida in Jacksonville. The class consisted of those individuals who desired a divorce but, for whatever reason, could not obtain a lawyer, either for a fee or pro bono, and did not feel comfortable in attempting to complete the necessary court papers

before appearing pro se before a judge. 1/

1/ While this litigation was in progress, the Florida Bar proposed and the Supreme Court of Florida approved a new simplified dissolution procedure. The proposal became Rule 1.611(c), Florida Rules of Civil Procedure along with the Rule's accompanying forms, Forms 1.943(b) through 1.934(e), Florida Rules of Civil Procedure. See, Amendment to the Florida Rules of Civil Procedure, 450 So.2d 817 (Fla. 1983). However, this simplified procedure, and the accompanying forms, was restricted to those persons seeking a divorce who had (a) agreed to the divorce, (b) had no minor children or the wife was not then pregnant, (c) had agreed to the joint division of their property, and (d) had agreed to the payment of the joint financial obligations. Consequently, those cases involving contested divorces, contested property settlement, custody and support of children or contested obligations on the couple's joint debts could not use the simplified procedure. After the proposed Rule was approved, the Petitioners agreed that the rule did not affect their class as the vast majority of the class had children or were involved in a contested divorce. Therefore, this new Rule did not materially help the class or resolve the issues before the District Court.

The Petitioners' Class sought to challenge Florida's enforcement of its UPL rules against such nonlawyer, for profit, commercial services. If, as the Petitioners' reasoned, Florida's rules were struck, they could continue their commercial business operations without any interference of the Florida Bar and the Supreme Court of Florida.

The Petitioners' contention before the District Court was that Florida's UPL rules denied the Petitioners access to the courts in violation of the equal protection and due process clauses of the Fourteenth Amendment. What were <u>not</u> presented as issues to the District Court were:

> 1. a claim that Florida barred the Petitioners from utilizing the Florida court system in any manner

or prevented them from presenting their cases pro se; or

2. a claim that Florida was preventing the Petitioners from seeking assistance from friends, neighbors or family members in the preparation of their legal questions.

The only issue before the District Court was the legality of Florida's UPL rules preventing nonlawyer, commercial, for profit businesses operating to "assist" members of the public to obtain certain legal results for a fee from the Petitioner class.

Respondents vigorously opposed Petitioners' contentions because, Respondents asserted, there was no constitutional right or other legal requirement placed on the Respondents to provide the Petitioners' class access to

commercial, for profit, but nonlicensed laypersons, to assist the Petitioners in obtaining a divorce. 2/

During the course of this proceeding, the Respondents, in a desire to loosen the restrictions placed on laypersons in the Brumbaugh decision, and reaffirmed in the Furman I decision, modified the UPL rules to permit limited oral communication with the public by nonlicensed person. Amendment to the Rule Regulating the Florida Bar (Chapter 10), 510 So.2d 596

2/ Ironically, even if the Petitioners could have been "assisted" in preparing their papers for a divorce by one of these nonlawyer, for profit, businesses, the Petitioners would still be required to appear pro se in court as the nonlicensed laypersons are not permitted to represent the Petitioners' class in court, a status the Petitioners never challenged in court.

(Fla. 1987). But, this communication was

> restricted to those communications reasonably necessary to elicit factual information to complete the [legal] form(s) [approved by the Supreme Court of Florida] and inform the individual how to file such form(s). (emphasis supplied)

Rule 10-1.1(b), Rules Regulating the Florida Bar. After this change, nonlicensed persons could elicit factual information to fill in the blanks on court approved forms but do nothing else such as the selection of the proper forms or the procedure to be followed in court.

At the time of the proposed rule change, no forms were submitted by the Florida Bar to the Supreme Court for approval. While the Supreme Court of Florida then directed the Florida Bar to draft such forms for the future, besides

the simplified dissolution forms (Forms 1.943 (b) through 1.943(e))in existence before the UPL rule change, no such forms concerning the dissolution of a marriage have been submitted to or approved by the Supreme Court of Florida. Therefore, since Petitioners' class cannot utilize the simplified dissolution procedure of Rule 1.611(c), Florida Rules of Civil Procedure, there have never been any court approved forms that the Petitioners could take to a nonlicensed layperson to fill

out in securing a dissolution. 3/

Shortly after the Supreme Court approved the rule change, Petitioners unilaterally decided they had the relief they desired and sought out the Respondents with their decision that the case was now moot. Dunn, 889 F.2d at 1013 [describing Petitioners' counsel letter of

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3/ This continues to be a major bone of contention between the Petitioners and the Respondents. Petitioners' counsel believes the change to Rule 10-1.1(b), Rules Regulating the Florida Bar, permits the nonlicensed layperson to complete any form contained in the Florida Rules of Court (West Pub. Co. 1989). In particular, Petitioners believe a nonlicensed layperson can take Form 1.943(a) (copy in the appendix) and fill in all the information necessary for the Petitioners to secure a divorce. The Respondents have consistently taken the position that the use of Form 1.943(a) by a nonlicensed layperson will result in that persons prosecution for the unlicensed practice of law.

July 27, 1987 to Respondents' counsel]. The Petitioners proposed to the Respondents that the case was moot and there would be no need to go forward with a trial on the merits. Id. They requested that the Respondents join in a stipulated dismissal of the case. Since the Respondents saw no reason to go forward if the Petitioners desired to end the litigation, they agreed to a dismissal but inserted into the agreement a statement that the Respondents asserted that the Petitioners were not a prevailing party.

So, contrary to the impression made by the Petitioners throughout their Petition, there was no settlement as one commonly understands the term. There was but an

agreement by the Respondent to allow dismissal of the suit if the Petitioners did not desire to go forward with their case. The signed stipulation nor the understanding of the parties addressed the merits of the case nor was it a concession by the Respondents that the petitioners acquired anything they sought in the rule change. Both the District Court and the Court of Appeals saw the stipulated dismissal for what it really was, a voluntary dismissal by the Petitioners. See, Dunn v. The Florida Bar, 726 F.Supp. 1261, 1267 (M.D. Fla. 1988) and 889 F.2d at 1012.

In response to the Petitioners' motion for fees, the Respondents immediately set forth their reasons why the Petitioners

were not a prevailing party. The Respondent Supreme Court emphasized the point that the Petitioners had never established the fact that there even existed a constitutional right for the Petitioners to use nonlicensed laypersons in securing legal services.

In an attempt to see if the Petitioners were a prevailing party, the District Court had to determine if the acts done by the Respondents outside of the scope of the lawsuit was required by law. The District Court was left with no alternative but to make a legal determination, based on the facts in the record. The District Court found that the Petitioners were not prevailing because there existed no right in the Petitioners

nor a duty in the Respondents to see to it that the Petitioners were provided with nonlicensed layperson legal assistance they could afford.

REASONS FOR DENYING THE WRIT

THE DECISION BELOW IS NOT IN CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS OR OF THIS COURT

1. THE ANALYSIS APPLIED BY THE COURT OF APPEAL BELOW IS IN LINE WITH THE ANALYSIS APPLIED BY THIS COURT AND THE OTHER COURTS OF APPEAL.

This case involved the termination of the litigation by the Petitioners before there was any judicial determination of the merits raised by the Petitioners. In attempting to reach the decision whether the Petitioners were a "prevailing party" under 42 U.S.C. Section 1988, the Petitioners attempt to leave the impression with this Court that the Court of Appeals below used a form of analysis, to determine "prevailing party" status,

not used by this Court or nine of the other courts of appeal. This impression is misleading.

To understand the analysis applied by the Court of Appeals, we must begin with the underlying intent of the Civil Rights Attorney's Fees Award Act, 42 U.S.C. Sec. 1988. The very basis of an award of attorney's fees is the vindication of a constitutional or statutory right. Smith v. Robinson, 468 U.S. 992, 1006 (1984); Maine v. Thiboutot, 448 U.S. 1, 9 (1980). Only one who prevails in protecting such rights is entitled to an award of fees. Texas State Teachers Association v. Garland Independent School District, ___ U.S. ___, 109 S. Ct. 1486, 1491 (1989).

Stated otherwise, fees are awardable:

> only to a party who has established his entitlement to some relief on the merits of his claim, either in the trial court or on appeal.

Hanrahan v. Hampton, 446 U.S. 754, 757 (1980).

In a typical case concerning a determination of whether the plaintiff is a "prevailing party" the courts often look to see if the plaintiff has "at least received some relief on the merits of his claim before he can be said to prevail." Hewitt v. Helms, 482 U.S. 755, 760 (1987). As this Court has stated, relief must result in the material alteration of the legal relationship between the plaintiff and the defendant. Texas State Teachers Association, ___ U.S. at ____, 109 S.Ct. at 1493. Consequently, "Section 1988 simply

does not create fee liability where merits liability is nonexistent." Kentucky v. Graham, 473 U.S. 159, 168 (1985).

Relief is not restricted only to those decisions resulting from final judgments. A party can be a prevailing party by resolving a case through a consent decree, settlement or voluntary cessation of unlawful conduct by the defendant. See, E.g., Hanrahan v. Hampton, 446 U.S. at 757.

But all these cases in which a termination of the proceeding occurred prior to a judicial decision assume that in each case there exists a constitutional or statutory right which the plaintiff is attempting to vindicate. But, what if, as happened throughout this case, there is

the allegation that no such constitutional or statutory right or legal obligation existed; that the actions of the defendant were not required by any law? How does one determine if the result achieved is worthy of an award of attorney's fee?

The first court to look at that question and form an analytical test was the First Circuit Court of Appeals in Nadeau v. Helgemoe, 581 F.2d 275 (1st Cir. 1978). There the First Circuit articulated a two-prong test to determine if an award of fees was appropriate in a case where no judicial determination on the merits was reached. The first prong of the test was whether the plaintiff was the causal factor in achieving the end result. Nadeau v. Helgemoe, 581 F.2d at

280-81. This is strictly a factual test. Id. The second prong to the test was a "legal" as well as factual analysis. Id., 581 F.2d at 281. The court decided that the plaintiff must not only show that factually his action precipitated the beneficial result but that, even with the beneficial result, if the

> defendants' conduct, however beneficial it may be to plaintiffs' interests, is not required by law, then defendants must be held to have acted gratuitously and plaintiffs have not prevailed in a legal sense. (emphasis added)

Id. The court of appeal decided it was proper for the district court to decide that question, based upon the facts and law of the case before it, under traditional constitutional theory. Id.

Nadeau ended up being the seminal case on this question. Its two-prong test, with the "not required by law" standard, has been nearly universally accepted by all the other Circuits. 4/ In fact, not only did the Eleventh Circuit Court below follow it, but of the Petitioners' cited so-called circuits in opposition to the Eleventh Circuit's citation of the "not required by law" test, the following Circuits have expressly adopted the Nadeau two-prong test, and its "required by law" standard, in their attorney's fees

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4/ Nadeau's second prong of its two-prong test has not been adopted by only the Second, Third or Fourth Circuits. This difference in the two lines of cases determining "prevailing parties" was noted in Chief Justice Rehnquist's dissenting opinion in Long v. Bonnes, 455 U.S. 961, 966-67 (1982).

decisions: Fifth Circuit - Hennigan v. Ouachita Parish School Board, 749 F.2d 1148, 1151 (5th Cir. 1985), Garcia v. Guerra, 744 F.2d 1159, 1162 (5th Cir. 1984) and Williams v. Leatherbury, 672 F.2d 549, 551 (5th Cir. 1982); Sixth Circuit - Webster v. Sowders, 846 F.2d 1032, 1037 (6th Cir. 1988) and Johnston v. Jago, 691 F.2d 283, 286 (6th Cir. 1982); Seventh Circuit - Palmer v. City of Chicago, 806 F.2d 1316, 1322 (7th Cir. 1986) (there are a number of other Seventh Circuit cases that expressly adopt the Nadeau two-prong test without expressly stating the "required by law" phrase. See, e.g., Lovell v. City of Kankakee, 783 F.2d 95, 97 (7th Cir. 1986)); Eighth Circuit - United Handicapped Federation v.

Andre, 622 F.2d 342, 346 (8th Cir. 1980) (Nadeau two-prong test reaffirmed in Premachandra v. Mitts, 727 F.2d 717, 721 (8th Cir. 1984), rev'd on other grounds, 753 F.2d 635 (8th Cir. 1985); Ninth Circuit - Greater Los Angles Council on Deafness v. Community Television of Southern California, 813 F.2d 217, 220 (9th Cir. 1987) and California Association of the Physically Handicapped v. F.C.C, 721 F.2d 667, 671-672 (9th Cir. 1983); Tenth Circuit - Goichman v. City of Aspen, 859 F.2d 1466, 1471 (10th Cir. 1988) and J & J Anderson, Inc. v. Town of Erie, 767

F.2d 1469, 1473 (10th Cir. 1985). 5/ The District of Columbia Circuit has adopted the Nadeau test without stating the "required by law" language. Grano v. Barry, 783 F.2d 1104, 1110 (D.C. Cir. 1986).

The error of Petitioners' argument is the belief that the analysis applied by the Eleventh Circuit Court of Appeals in this case is different from that applied in the Nadeau decision and by the other Circuits. What we have in fact is but one standard but one that is often stated in different terms. Thus, stated as a

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5/ The First Circuit has continued to follow its earlier two-prong test in Nadeau along with its "required by law" language. See, Ortiz De Arroyo v. Barcello, 765 F.2d 275, 282 (1st Cir. 1985).

cliche, the analyses applied by all these court are but "different sides of the same coin." The courts have cited both the "required by law" and the "frivolous, unreasonable, or groundless" language from Nadeau, using such a phrase as "stated otherwise" when setting forth both Nadeau statements. See, Sablan v. Department of Finance of North Mariana Islands, 856 F.2d 1317, 1325 (9th Cir. 1988).

While some Circuits do use the phrase "frivolous, unreasonable, or groundless" in determining whether the plaintiff's claim states a legal claim, other Circuits used such terms as "arguably supported by case or statutory law" (Garcia v. Guerra, 744 F.2d at 1163), "legal basis" (Sablan, 856 F.2d at 1325; California Association

of the Physically Handicapped, 721 F.2d at 672); "minimum basis in law" (Miller v. Staats, 706 F.2d 336, 342 (D.C. 1983); Johnson v. Jago, 691 F.2d at 286) or "colorable civil rights claim" (Grano v. Barry, 783 F.2d at 1110) to describe the showing the plaintiff must make in order to be deemed a "prevailing party." 6/

Therefore, contrary to the Petitioners' assertions, the Eleventh Circuit below applied the same standard or test adopted or utilized by the other Circuit Courts of Appeal. The "not required by law" test of Nadeau, stated in

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6/ Even Chief Justice Rehnquist used the phrase "some basis in law" to describe the minimum legal threshold level the plaintiff must present in order to be entitled to an award of attorney's fees. Long v. Bonnes, 455 U.S. at 967.

its various forms, is nearly uniform throughout the United States and there exist no division among the courts of appeal using the Nadeau two-prong test. 7/

2. THE DECISION BELOW DOES NOT CONFLICT WITH THE PURPOSES OF SEC. 1988

The Petitioners next assert that the decision below conflicts with the underlying purpose of Section 1988 by requiring the Petitioners to show to the court what constitutional or statutory

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7/ Thus the "only" conflict that really does exist is the conflict between the Nadeau line of cases and the Bonnes v. Long, 599 F.2d 1316 (4th Cir. 1979), remanded, 651 F.2d 214 (4th Cir. 1981), cert. denied, 455 U.S. 961 (1982), line of cases.

right was violated by the Respondents and vindicated by the Petitioners.

Petitioners misunderstand the meaning of the lowers courts' decisions. The decisions do not reflect a requirement the a plaintiff show that he would "prevail" on the merits; rather, the decision was but an exercise in determining whether there even existed a constitutional right upon attorney's fees could be awarded to a plaintiff. This form of analysis applied in this case has been applied by many of the other Circuit Courts of Appeal in order to determine if the plaintiff was a prevailing party in a case terminated prior to a judicial determination. See, Goichman v. City of Aspen, supra; Sablan v. Department of Finance of North Mariana

Islands, supra; Garcia v. Guerra, supra; Johnston v. Jago, supra.

Here the Court of Appeal reached the conclusion that no such constitutional right existed and that, had the Petitioners continued, they would have not won. The Court of Appeals did this by restricting itself to the facts in the record and the clear statement of the law. However, if the Court of Appeals had found that such a constitutional right had been established, then the inquiry would have ceased as the Petitioners would have been entitled to fees as the prevailing party.

The Respondents are not in any way challenging the holdings of this Court that attorneys fees are awardable at the end of a settlement or upon unilateral

action by a defendant. Rather, only that "when" a settlement or other non-judicial resolution is reached, there existed a recognizable constitutional or statutory right upon which the plaintiff bases his action against a defendant. Anything less would permit an award of fees irrespective of the existence of a constitutional right and contrary to this Court's position that Section 1988 not permit fees where no merits liability exists. 8/ Kentucky v. Graham, 473 U.S. at 168.

8/ And as Justice Brennan observed in Hensley v. Eckerhart, 461 U.S. 424, 446 (1983), Section 1988 is not a "relief fund for lawyers," rather requiring that the plaintiff be a "prevailing party." Therefore, the existence of a constitutional right upon which a plaintiff bases his claim is mandatory. Otherwise, Section 1988 would digress into a lawyer relief act. See also, Kentucky v. Graham, 473 U.S. 159, 168 (1985).

3. THE DECISION OF THE COURT OF APPEAL DOES NOT CONTRAVENE THE PUBLIC POLICY FAVORING SETTLEMENTS

The Petitioners present the argument that the decision of the Court of Appeals undermines the public policy encouraging settlements. This assertion is baseless.

To repeat, this was <u>not</u> a case concerning a settlement. This was a case involving a voluntary dismissal by the Petitioners and then a unilateral claim of victory coupled with a claim for attorney's fees. This is far from the situation of a negotiated settlement where both sides sit down to resolve their differences. Rather, this was a frivolous case from the beginning with the Petitioners claiming victory and then

seeking fees for bringing such an action.

Contrary to the Petitioners' assertions, an award of fees under the conditions presented here (a claim not based upon any established constitutional or statutory right and the denial of the court to determine the validity of the asserted claim) will surely lead defendants to refused to do anything at all until the case is brought to a final conclusion proving their point. This action would be contrary to the intent of Congress in simply having defendants dispose of frivolous cases without liability for attorney's fees.

Therefore, in a case where the legal claim being asserted is questionable, defendants will litigate the issue until

the end to prove that their conduct was "not required by law" or that the plaintiff's action was "frivolous, unreasonable or groundless" in order not to be subject to an award of attorney's fees.

The Petitioners' citations of Hensley v. Eckerhart, 461 U.S. 424 (1983), Long v. Bonnes, 455 U.S. 961 (1982) and Garcia v. Guerra, 744 F.2d 1159 (5th Cir. 1984) are misplaced. In Hensley, the district court, after a trial on the merits, found the defendants had violated the Constitution on five of the six grounds asserted. The issue before the Court concerned the legality under Section 1988 of awarding fees for time spent on the unsuccessful claims.

In Bonnes, Chief Justice Rehnquist stated that a trial was not necessary to determine attorney fees but he also approved of the Nadeau two-prong test analysis and the finding of the First Circuit Court that a district court will in most cases have a complete enough record to reach the legal conclusion whether or not plaintiff possessed some basis in law to bring the action or the defendant was required by law to alter his conduct. Long v. Bonnes, 455 U.S. at 966 n.3.

Finally, the Fifth Circuit in Garcia v. Guerra, while also stating a trial on the merits is not necessary to determine attorney's fees, did state a standard the district courts were to follow. Based

upon the facts in the record before it, a district court could determine the eligibility for fees by merely looking at the plaintiff's claim and see if it was "arguably supported by case or statutory law." Garcia v. Guerra, 744 F.2d at 1163.

It was exactly this standard ("arguably supported by case or statutory law) that the District Court used to determine if the Petitioners' claim entitled them to fees. Dunn, 726 F.Supp. at 1270 and 1275.

The decision below is consistent with the policy of settlements and does not require a court to have a trial on the merits to determine if attorney's fees are awardable to the plaintiffs.

4. THE DECISION OF THE COURT OF APPEALS DOES NOT DO DAMAGE TO THE "CASE OR CONTROVERSY" REQUIREMENT OF ARTICLE III, SECTION 2 OF THE CONSTITUTION

Finally, Petitioners assert that the decision of the Court of Appeals does violence to the "case" or "controversy" requirement of Article III, Section 2 of the Constitution by permitting the federal courts to make decisions on the merits of the Petitioners' claims during the attorney's fees portion of the case. If this assertion were accepted practice, the federal courts would be unable to determine the legal basis of a plaintiff's claim when the case ends in a voluntary dismissal.

The Petitioners begin their argument by claiming they were not seeking to impose "a constitutional obligation to provide lay assistance" to Petitioners. Petition for a Writ, p.16. Rather they were seeking an injunction to prevent Florida from enforcing its UPL rules against lay assistants. 9/ Id.

The decision of the Court of Appeals was not given to effect an "advisory opinion" but made in order to decide whether the Respondents' action in amending their UPL rules was "required by law" entitling the Petitioners to an award

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9/ Ironically, on its face, Petitioners admit they presented no constitutional claim to the District Court. Furthermore, no court has ever found a constitutional violation in the application of UPL laws against nonlicensed persons admittedly practicing law.

of attorney's fees. However, to deny this ability of review to the courts would prevent the courts from determining if in fact a constitutional or statutory right was violated.

CONCLUSION

For the reasons given above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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No. 89-1691

In The

Supreme Court of the United States

October Term, 1989

SERENA DUNN, et al.,

Petitioners,

v.

THE FLORIDA BAR, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF THE FLORIDA BAR AND ITS PRESIDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHEN A CIVIL RIGHTS PLAINTIFF CLASS, SEEKING TO ESTABLISH A CONSTITUTIONAL RIGHT TO CONSULT WITH NON-LAWYERS FOR ASSISTANCE IN OBTAINING A MARRIAGE DISSOLUTION, UNILATERALLY DETERMINES TO DISMISS ITS LAWSUIT AND SEEKS ATTORNEYS' FEES AS A PREVAILING PARTY PURSUANT TO 42 U.S.C.§ 1988, CAN THE TRIAL COURT DENY FEES BECAUSE THE CLASS' CLAIMS HAVE NO COLORABLE CONSTITUTIONAL BASIS.

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STATEMENT OF THE CASE

Respondents The Florida Bar and its President ("the Bar") adopt the Statement of the Case of Respondent, the Supreme Court of Florida, with the following additions.

Petitioners' third amended complaint sought to enjoin the Florida Supreme Court and the Bar from prohibiting in any way non-lawyers from aiding petitioners in obtaining a dissolution of marriage. The Bar moved to dismiss petitioners' complaint, contending that (1) the action was barred by the Eleventh Amendment; (2) the complaint failed to allege a deprivation of any constitutional right because it alleged no more than that the Bar, by carrying out its mandate from the Florida Supreme Court to prohibit non-lawyers from dispensing legal advice, violated an alleged "fundamental right" of the plaintiff class to receive legal advice from legally untrained persons; (3) the petitioners had no constitutional right to counsel in dissolution proceedings, *e.g.*, *Lassiter v. Department of Social Services of Durham County*, 452 U.S.18 (1981); therefore, they certainly had no constitutional right to consult with non-lawyers; and (4) the only cases relied upon by petitioners to support their constitutional claim, *Boddie v. Connecticut*, 401 U.S.371 (1971), and *Johnson v. Avery*, 393 U.S.483 (1969), could not be extended to establish a constitutional right of petitioners to consult with non-lawyers in dissolution proceedings. The trial court denied the Bar's motion to dismiss in a one-line opinion, without citing any reason.

Following class certification, the Bar also moved for summary judgment under the doctrine of *Hicks v. Miranda*, 422 U.S.332, 344 (1975), that a dismissal of an appeal

by this Court for want of a substantial federal question is a determination of the merits of the case and binding precedent for lower courts presented with the same issue. In *Furman v. The Florida Bar*, 444 U.S.1061 (1980), this Court had dismissed an appeal from the decision of the Florida Supreme Court, *The Florida Bar v. Furman*, 376 So.2d 378 (Fla.1979) "for want of a substantial federal question." Under *Hicks*, this Court's dismissal in *Furman* was an adjudication on the merits of the constitutional issues presented in that appeal and established binding Supreme Court precedent on those issues. The Bar contended that because the constitutional issues raised by petitioners in this case (represented by Alan Morrison, Esquire, who was also counsel in the *Furman* case), are identical to those decided adversely to their position by this Court in the *Furman* case, the trial court was bound by this Court's prior decision. The trial court denied the motion for summary judgment.

Thereafter, the trial court set the case for trial. However, before the case could be tried and before the trial court had any opportunity to rule on the merits of the constitutional issues presented, petitioners *unilaterally* decided to *voluntarily* dismiss the action with prejudice, without receiving any relief on the merits of their claim. The petitioners did so, they say, because they believed that a rule change adopted by the Florida Supreme Court had given them "substantially all the relief which they had sought. . . . " However, Mr. Morrison testified at the attorneys' fee hearing that the Bar never agreed that petitioners were prevailing parties as a result of the rule change. Indeed, Mr. Morrison testified that he did not notify the Bar's counsel of his participation in the Florida

Supreme Court rulemaking process and that "in hindsight," he probably should have.

Thus, contrary to the numerous statements in petitioners' petition, this case was never "settled." Rather, petitioners unilaterally determined to voluntarily dismiss the case, and respondents certainly did not object. In the stipulation of dismissal, respondents were careful to make clear that they were not agreeing that petitioners were prevailing parties or that petitioners had obtained the relief which they sought. Because of petitioners' decision to voluntarily dismiss the case, the trial court was never required to decide the merits of petitioners' constitutional claims, and respondents never had an opportunity to appeal the trial court's denial of their motion to dismiss and motion for summary judgment.

REASONS FOR DENYING THE WRIT

I.

THE DECISION BELOW IS NOT IN CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS OR OF THIS COURT

Petitioners contend that in determining whether petitioners were prevailing parties under 42 U.S.C.§ 1988, the court of appeals "in practical effect required petitioners to show that they would have prevailed had the case been litigated to judgment, rather than concluded by stipulated dismissal" (Pet.10),[1] and that this holding is in

[1] References to "Pet. ___" are to the Petition for Writ of Certiorari.

conflict with those of other courts of appeals and of this Court. In fact, the court of appeals' analysis expressly eschews such an approach and applies the *Nadeau v. Helgemoe*, 581 F.2d 275 (1st Cir.1978), two-prong test which is in accord with the decisions of other courts of appeals and this Court. In cases such as this, where there has been no judicial determination of the merits of plaintiffs' claim, the courts have almost universally adopted the analysis of *Nadeau* for determining prevailing party status.[2] [3]

The *Nadeau* analysis requires that two tests be met. First, a plaintiff must establish that the lawsuit was causally linked to securing the relief obtained,[4] and second, that the defendant's conduct in response to the lawsuit was required by law. "If it has been judicially determined that the defendants' conduct, however beneficial it may

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[2] In determining whether a party is entitled to an award of attorneys' fees under 42 U.S.C.§ 1988, a court must make a threshold determination of whether the party is a "prevailing party." *Texas State Teachers Ass'n v. Garland Independent School Dist.*, ___ U.S. ___, 109 S.Ct.1486, 1491 (1989).

[3] The circuits expressly adopting the *Nadeau* two-prong test are listed by the respondent, Supreme Court of Florida, in its brief in opposition (hereinafter "Opposition"), and will not be repeated here. *See* Opposition at 20-21. Moreover, petitioners themselves recognize *Nadeau* as the "leading case" on this issue (Pet.12, n.3).

[4] The respondents have adamantly contended that the plaintiff class is in no better position than it was prior to the filing of the suit and, therefore, that no relief has been obtained. Moreover, the respondents have consistently contended that this lawsuit was not the "catalyst" for any relief obtained by the plaintiff class, a position rejected by the court of appeals (Pet.8(a)-12(a)).

be to plaintiffs' interests, is not required by law, then defendants must be held to have acted gratuitously and plaintiffs have not prevailed in a legal sense." *Nadeau*, 581 F.2d at 281. Stated otherwise, the defendant's conduct must be other than a "wholly gratuitous response to an action that in itself was frivolous and groundless." *Williams v. Leatherbury*, 672 F.2d 549, 551 (5th Cir.1982); *Nadeau*, 581 F.2d at 281.

Almost all of the circuits have expressly adopted the *Nadeau* test, and although the actual verbal expression of the test has been honed by the various courts of appeals, the gist and the effect of the test remain the same. Whether the test is described as "required by law" or "not frivolous, nor groundless," or "constituting a colorable constitutional claim," the courts of appeals are requiring that there be some legal basis for a claim before a plaintiff is entitled to attorneys' fees.

This does not mean that a plaintiff must show that he would have prevailed had the case been litigated to judgment. The "legal inquiry does not entail full trial on the merits. Rather, the trial court need only consider whether the plaintiff's claim is "frivolous, unreasonable or groundless." *Johnston v. Jago*, 691 F.2d 283, 286 (6th Cir.1982) (quoting *Nadeau v. Helgemoe*, 582 F.2d 275, 281 (1st Cir.1978), and *Christiansburg Garment Co. v. EEOC*, 434 U.S.412, 422 (1978)).

Petitioners seek to make much of the trial court's denial of respondents' motions to dismiss and for summary judgment. However, these rulings, in and of themselves, do not make petitioners "prevailing parties." *See Hewitt v. Helms*, 482 U.S.755, 107 S.Ct.2672, 2675 (1987)

("[t]he most that [plaintiff] obtained was an interlocutory ruling that his complaint should not have been dismissed for failure to state a constitutional claim. That is not the stuff of which legal victories are made").

In *Nadeau*, the court recognized that the argument could be made that the "court cannot meaningfully decide the legal requirements that govern defendants' conduct without conducting the very trial the consent decree was designed to avoid," but rejected that concern, stating, "we believe the court has had sufficient exposure to the facts and law of this case to determine, whether if plaintiffs had continued to press their claims under traditional constitutional theory, their action could be considered 'frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so.' " *Nadeau*, 581 F.2d at 281 (quoting *Christiansburg Garment Co. v. EEOC*, 434 U.S.412, 422 (1978)).

The approach taken by the Eleventh Circuit in this case mirrors the approach taken by *Nadeau*, and is in line with other circuits and decisions of this Court. Nowhere in its holding did the court of appeals imply that the appropriate test for determining whether petitioners were entitled to attorneys' fees required petitioners to show they would have prevailed had the case been litigated to judgment. In fact, noting *Garcia v. Guerra*, 744 F.2d 1159, 1162-63 (5th Cir.1984), *cert. denied*, 471 U.S.1065 (1985), the Eleventh Circuit explicitly recognized:

> "The second prong of the *Leatherbury* test, consequently, does not require appellants to show that they would have won on the merits. Rather, as the *Leatherbury* case said, appellants need only show that the action taken by the

> appellees was 'not a wholly gratuitous response to an action that in itself was frivolous or groundless.' A claim is not frivolous if it is arguably supported by case or statutory law" (citations omitted) (Pet.12(a), 13(a)).

The practical effect of the Eleventh Circuit's ruling was to require petitioners to show a basis in law for their claim. The court of appeals, being very careful not to suggest that the novelty of petitioners' claim compelled its defeat, correctly concluded that "[n]o stretch of logic can extend those holdings [*Boddie v. Connecticut*, 401 U.S.371 (1971); *Johnson v. Avery*, 393 U.S.483 (1969), and *Bounds v. Smith*, 430 U.S.817 (1977)] to the case before us now" (Pet.17(a)). In other words, the petitioners' claim cannot be arguably supported by case or statutory law.

To hold other than the court of appeals did would result in an anomalous situation where a plaintiff would only have to *allege* a civil rights violation to satisfy the second prong of the *Nadeau* test and thereby be entitled to fees, without regard to whether the allegation had any basis in law. As the purpose of 42 U.S.C.§ 1988 is to vindicate civil rights *violations*, not civil rights *allegations*, such a rule would be in direct contravention of the intent of Congress in enacting the statute.

II.

THE DECISION BELOW IS IN ACCORD WITH THE PURPOSE OF 42 U.S.C.§ 1988 AND PRIOR DECISIONS OF THIS COURT

Congress, in recognizing that " 'a vast majority of the victims of civil rights violations cannot afford legal counsel [and] are unable to present their cases to the courts,' "

enacted the Civil Rights Attorney's Fees Awards Act of 1976 (the "Act"); H.R.Rep.No.1558, 94th Cong., 2d Sess.1, *reprinted in* 1976 U.S.Code Cong.& Admin.News 5910. *See Long v. Bonnes*, 455 U.S.961, 967 (1982) (Rhenquist, J., joined by O'Connor, J., dissenting from denial of certiorari). In keeping with the dictates and purpose of 42 U.S.C.§ 1988, before attorneys' fees can be awarded, a determination must be made as to whether the claimant is indeed a "prevailing party." *Texas State Teachers Ass'n*, 109 S.Ct. at 1491; *Hewitt v. Helms*, 482 U.S.755 (1987). Implicit in that determination is the question of whether the benefit to the plaintiff was required by law.

Often, a judicial determination on the merits of the claim has already been made (through a final judgment, summary judgment or the like), and the inquiry need go no further. However, when no judicial determination has been made on the merits of plaintiff's claim and the defendant contends that no constitutional or statutory basis for plaintiff's claim exists, the court must analyze the claim to determine, not whether the plaintiff would have won on the merits, but whether the action taken by the defendant was required by law and not gratuitous. The court of appeals properly applied the second prong of the *Nadeau* test to make that determination and correctly concluded that petitioners had not demonstrated that the respondents' conduct was required by law.

Any other result would be contrary to the purpose of 42 U.S.C.§ 1988 and to common sense. The Act was not meant to create a windfall for attorneys who press forward with nonmeritorious claims (*i.e.*, claims not supported by statutory or case law), even if some change in

conduct on the part of the defendant is prompted by such litigation.[5]

III.

THE DECISION OF THE COURT OF APPEALS DOES NOT IMPAIR THE PUBLIC POLICY FAVORING SETTLEMENTS

Petitioners claim that the decision of the Eleventh Circuit will "undermine the longstanding, and increasingly important, public policy favoring settlement and other forms of extra-judicial dispute resolution" (Pet.14).

Petitioners' argument is faulty for two reasons. First, it unfairly implies that the case at hand was resolved through a settlement. *There was no settlement in this case.* This case was resolved after petitioners voluntarily dismissed the action with prejudice, unilaterally claiming that a subsequent change in the rules regulating The Florida Bar had satisfied their claim (Pet.7(a), 8(a)). At the time of the dismissal, respondents never agreed that the petitioners were prevailing parties as a result of the rule change and vigorously contested petitioners' "prevailing party" status throughout the proceedings.

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[5] Contrary to petitioners' position (Pet.13-14), this Court's decision in *Maher v. Gagne*, 448 U.S.122 (1980), does not support petitioners' argument. *Maher* involved a civil rights suit which was resolved by settlement, whereas, contrary to petitioners' attempts to characterize this case as having been "settled," it was petitioners' unilateral decision to voluntarily dismiss the case which terminated this litigation. Moreover, the constitutional claims at issue in *Maher* had been previously held by the trial court and the court of appeals to be colorable.

Second, as noted by the court in *Nadeau*,

> "[T]he argument cuts both ways. If defendants may refuse to settle a case and accept the cost of continued litigation to avoid paying attorney's fees, it is equally likely that plaintiffs' counsel, rather than receive no compensation at all for their efforts, would be willing to continue the litigation on the chance that they might cut if not eliminate their losses. We cannot decide this issue based on such honest but speculative concerns." *Nadeau*, 581 F.2d at 282.

If the Eleventh Circuit had awarded petitioners' attorneys' fees without first inquiring whether petitioners' claims had any basis in statutory or case law, the court of appeals would be, in effect, encouraging the filing of nonmeritorious civil rights claims. On the other hand, if the court of appeals had denied attorneys' fees solely on the ground that there had been no judicial determination on the merits of plaintiff's claim, the court of appeals would be, in effect, discouraging resolution of the dispute before a full trial on the merits. The *Nadeau* test, as applied by the Eleventh Circuit in this case, "strikes the proper balance between rewarding the filing of wholly frivolous lawsuits on the one extreme and, on the other extreme, withholding fees unless the plaintiff's claim is fully evaluated on the merits." Johnston, 691 F.2d at 286.

The decision of the court of appeals below is consistent with public policy favoring settlements. Any other result would create an imbalance in competing but equally important interests.

IV.

THE DECISION OF THE COURT OF APPEALS DOES NO DAMAGE TO THE "CASE OR CONTROVERSY" REQUIREMENT OF ARTICLE III, SECTION 2 OF THE CONSTITUTION

Petitioners assert that the decision below may potentially damage the principle that federal courts sit to decide "cases" or "controversies" because, in deciding the attorneys' fees question, the court of appeals issued an advisory opinion rejecting petitioners' constitutional claim (Pet.15-16).

Petitioners propose that instead of issuing an advisory opinion, the court of appeals should have simply inquired into whether petitioners' claim was frivolous (Pet.16). In effect, that is exactly what the court of appeals did (Pet.12(a)-13(a)). The court of appeals quoted directly from *Garcia*, 744 F.2d at 1163, where that court recognized that a decision on the merits of the appellants' claim was not required and that appellants need only show that the action taken by the appellees was "not a wholly gratuitous response to an action that in itself was frivolous and groundless" (quoting *Leatherbury*, 672 F.2d at 551). The *Garcia* court stated that a claim is not frivolous if it is arguably supported by case or statutory law. *Id.* at 1163. The analysis of the Eleventh Circuit is in accord with the analysis used by other courts of appeals in similar cases and, interestingly enough, is in accord with petitioners' own proposed standard.

The court of appeals described its task this way:

> *"[W]e must examine prior case and statutory law, not only to ascertain their holdings and text, but to*

> *examine their ramifications, and to determine to our own satisfaction that the Constitution could not, under even the most expansive of interpretations, lend color to appellants' claim"* (Pet.15(a) (emphasis added)).

After examining the decisions relied on by petitioners, the Eleventh Circuit concluded that none of the cases arguably supported petitioners' claim (Pet.16(a)).

To suggest that the court of appeals could do any less in a case where there has been no judicial determination on the merits is to suggest that attorneys' fees be automatically awarded in cases where the dispute is terminated (by voluntary dismissal or otherwise) before judgment. It would also enable a civil rights plaintiff to rob the court of appeals of any meaningful review in a civil rights fee case where the trial court has denied a motion to dismiss or motion for summary judgment. For, under petitioners' formulation, these preliminary rulings by the trial court *ipso facto* mean their claim is "colorable," thereby entitling them to fees. Such a rule would be an illogical and overly simplistic approach to awarding fees under 42 U.S.C.§ 1988.

CONCLUSION

For the reasons given above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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No. 89-1691

IN THE
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THE FLORIDA BAR, *et al*,
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REPLY BRIEF OF PETITIONERS IN SUPPORT OF CERTIORARI

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1. The opposition of respondent Supreme Court of Florida* does not dispute that, in assessing petitioners' eligibility for fees, the Eleventh Circuit required petitioners to prove that they would have prevailed on the merits, even though the parties had previously entered into a stipulated dismissal. In fact, at numerous points in its opposition, respondent maintains that a trial court *must* decide as a matter of law whether the plaintiff vindicated an established constitutional or statutory right, and that the Eleventh Circuit properly engaged in

* By letter to the Clerk of this Court dated June 28, 1990, The Florida Bar and its President, James Fox Miller, waived their right to respond to the petition.

such an inquiry to decide the fee issue in this case. *See* Opposition at 12-13 (courts below were required to "make a legal determination...that the Petitioners were not prevailing because there existed no right" to the relief they claimed), 12 ("Petitioners had never established the fact that there even existed a constitutional right"), 18 ("no such constitutional or statutory right existed..."), 28 ("Court of Appeal[s] reached the conclusion that no such constitutional right existed", but if it "had found that such a constitutional right had been established,...Petitioners would have been entitled to fees as the prevailing party"), 29 (there must "exist[] a recognizable constitutional or statutory right").

The parties are thus in agreement that the Eleventh Circuit's analysis asked whether "in fact a constitutional ...right was violated." *Id.* at 37. While respondent demands this type of merits review, petitioners urge the standard embraced by a majority of the circuits, which would impose an easily discernible threshold of legal plausibility, thus dispensing with "the very trial which the settlement was intended to avoid." *Long v. Bonnes*, 455 U.S. 961, 966 n.3 (1982)(Rehnquist, J., joined by O'Connor, J., dissenting from denial of certiorari); *see also Maher v. Gagne*, 448 U.S. 122, 134 (1980)(concurring opinion of Powell, J.)(in awarding fees, court should not look behind the settlement of a substantial federal claim).

The Supreme Court of Florida's opposition, therefore, simply reinforces the existence of a split among the circuits and the necessity for this Court to resolve it.

2. Insisting that, in cases resolved short of adjudication, the court must decide whether the defendant's conduct was "required by law," respondent appears untroubled by a regime which necessarily

requires that opinions on the merits be issued in the context of resolving fee disputes. *See* Opposition at 35-37. By requiring such rulings in cases where settlement is reached, the court is compelled to give plenary consideration of the merits *after* the parties have affirmatively decided to do otherwise. This will force the courts to resolve important constitutional and statutory questions in a context possessing many of the attributes of advisory decision making. *Cf. Pierce v. Underwood*, 487 U.S. 552, 561 (1988)(review by the courts of appeals of attorney's fee decisions under the Equal Access to Justice Act's "substantial justification" standard should be deferential, because *de novo* review would "effectively establish the circuit law in a most peculiar, secondhanded fashion"); *Cooter & Gell v. Hartmax*, ___U.S.___, 110 S.Ct. 2447, 2460 (1990)(*de novo* review of district court decisions concerning the legal sufficiency of pleadings under Fed. R. Civ. P. 11 would "'strangely distort the appellate process'"), *quoting Pierce*, 487 U.S. at 561.

In short, what respondent argues is required—a definitive decision on the merits *after* settlement (Opposition at 35-36)—is precisely what *Maher*, *supra*, teaches is not the proper business of the federal courts which sit to decide actual "cases" or "controversies." This insistence on full adjudication as part of resolving a fee dispute in settled cases is a further reason why review should be granted.

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